Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THE CITY OF FORT WORTH, TEXAS,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In 1968, acting under the federal government's order to consolidate air passenger service in North Texas, the cities of Dallas and Fort Worth agreed jointly to finance and construct Dallas-Fort Worth International Airport (**"DFW Airport"**). To comply with federal mandates and assure the feasibility of the new airport, the cities covenanted to transfer existing passenger service to DFW Airport and to limit interstate service at their other airports, including nearby Love Field (located only twelve miles away). **Whether the Fifth Circuit, in conflict with decisions of the Colorado Supreme Court and Second Circuit, erred in concluding that the Airline Deregulation Act, 49 U.S.C § 41713(b)(1), preempts two cities' formal agreement to build and operate a regional airport to accommodate all long-haul passenger service in that region, and to limit other facilities in that area to short-haul traffic and general aviation?**

2. To insure the viability of DFW Airport, the major airlines serving Dallas and Fort Worth were enticed to relocate to DFW Airport through "Use Agreements," which are mutually beneficial contracts between the airlines and the Dallas-Fort Worth Airport Board. **Whether the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), preempts contractual obligations voluntarily undertaken between airlines and a regional airport board that restrict interstate flights to a new regional airport?**

3. Almost one year after Fort Worth commenced a state court action against Dallas and others to prevent the

QUESTIONS PRESENTED – Continued

unlawful expansion of services at Love Field, the Department of Transportation ("DOT") initiated an interpretive proceeding to decide the same issues. After the state court entered final judgment, DOT issued an opinion that directly contradicted the state court's judgment. **Whether a federal agency, having failed to participate in a pending state court lawsuit, may initiate an interpretive proceeding involving the same principal parties and legal questions, and then issue a declaratory ruling that contradicts the final judgment previously entered by the state court?**

PARTIES TO THE PROCEEDING

The following is a list of parties that participated in the proceeding in the Court of Appeals for the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI

The City of Fort Worth, Texas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported, but is reproduced at Appendix A (Pet.App. 1). The declaratory and procedural opinions of the Department of Transportation are unreported, but are reproduced at Appendices B (Pet.App. 53) and C (Pet.App. 147), respectively. The final judgment issued by the Texas trial court in a related proceeding is reproduced at Appendix D (Pet.App. 178).

JURISDICTION

The court of appeals entered its judgment on February 1, 2000, and issued a revised opinion on February 24, 2000 (Pet.App. 1). No petition for rehearing has been filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Airline Deregulation Act. The pertinent portions of the Airline Deregulation Act ("**ADA**"), 49 U.S.C. § 41713(b), provide:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

The Wright Amendment. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980), provides:

> Sec. 29 (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft

with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

The Shelby Amendment. Sections 337(a) and (b) of the Department of Transportation and Related Agencies

Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) provide:

> SEC. 337(a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".

28 U.S.C. § 1738. Section 1738 of 28 U.S.C. provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Act, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within

the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. Introduction.

This case implicates issues of national importance never addressed by the Court, including an airport proprietor's ability under the Airline Deregulation Act to consolidate long-haul scheduled passenger service at one airport and maintain other airports within the same regional system as short-haul and general aviation airports. This petition also involves the authority of a federal agency to commence an administrative proceeding for the sole purpose of contradicting and undermining a final judgment previously entered by a state court involving the same principal parties and issues.

The Fifth Circuit's decision necessitates review by this Court for at least three reasons:

First, the Fifth Circuit has made it virtually impossible for states and political subdivisions to establish regional air transportation systems. The Fifth Circuit's decision that the ADA preempts the four-state perimeter rule at Love Field directly conflicts with the opinions of the Colorado Supreme Court in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998), and the Second Circuit in *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006

(1988). Both of those courts concluded the ADA does not preempt a local airport proprietor's ability to differentiate between the type and level of service at each airport in a regional airport system.

Second, the Fifth Circuit has interpreted the ADA to preempt contractual agreements voluntarily undertaken between airlines and local airport authorities. The Fifth Circuit's decision is contrary to this Court's holding in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995) that the ADA does not preempt self-imposed contractual obligations.

Third, the Fifth Circuit has bestowed unprecedented authority upon a federal agency by concluding that an agency may commence its own administrative proceeding to relitigate specific issues between specific parties when the agency disagrees with a prior state court judgment. [Pet.App. 178] The Fifth Circuit's conclusion that DOT was not obligated to accord preclusive effect to a prior state court judgment is inconsistent with decisions from several other federal courts, including *Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 20-21 (1st Cir. 1997), *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993), *Midgett v. United States*, 603 F.2d 835, 845 (Ct. Cl. 1979), and *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967).

B. Relevant Facts.

In 1962, the Civil Aeronautics Board **("CAB")** instituted an investigation to determine whether the cities of Dallas and Fort Worth should be required to consolidate commercial passenger service at one airport. [Pet.App. 2] At the time, Dallas and Fort Worth operated independent

and competing airports, including Dallas's Love Field. [Pet.App. 2, 57]

After an evidentiary hearing, CAB issued an order "that service to Dallas and Fort Worth should be required through a single airport." [Pet.App. 2] CAB instructed the cities that if they did not agree on a single airport for all passenger service, it would designate one for them. [Pet.App. 2]

To comply with CAB's mandate, the cities executed a certain Contract and Agreement dated April 15, 1968, which created a joint venture to build DFW Airport. Under the Contract, the cities are co-owners of DFW Airport, which is operated on their behalf by the DFW Airport Board.

To comply with the order that the cities "transition to service through a single airport" and to authorize the issuance of bonds to finance DFW Airport, the cities passed the 1968 Regional Airport Concurrent Bond Ordinance (**"Concurrent Ordinance"**). [Pet.App. 2, 58-61] Pursuant to the Concurrent Ordinance, the Cities jointly have issued nearly two billion dollars in DFW Airport revenue bonds, one billion of which remain outstanding.

Important to this petition is Section 9.5 of the Concurrent Ordinance, which obligates the cities to "take such steps as may be necessary, appropriate and legally permissible . . . to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to [DFW]

Regional Airport."[1] [Pet.App. 2-3, 58-61] Section 9.5 also requires the cities to refrain from acts competitive with DFW Airport. [Pet.App. 60]

In the early 1970s, Fort Worth demolished GSIA and the eight CAB-certificated air carriers who were using Dallas and Fort Worth airports signed "Use Agreements" with the DFW Airport Board, agreeing to move their services to DFW Airport. [Pet.App. 3, 57] Southwest Airlines, however, refused to relocate and in *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974), it was determined that Southwest could not be forced to vacate Love Field, as long as Love Field remained open, since Southwest was not a CAB-certificated carrier and was flying only intrastate routes. [Pet.App. 3]

In 1978, ten years after the cities' agreement to build DFW Airport, Congress enacted the Airline Deregulation Act, 92 Stat. 1705. The ADA preempts States and their political subdivisions from exercising *police* or *regulatory* powers with respect to the routes, rates or services of airlines. 49 U.S.C. § 41713(b)(1). However, the ADA exempts from preemption the right of local governments, such as Dallas and Fort Worth, to exercise their powers as *proprietors* of such airports.[2] 49 U.S.C. § 41713(b)(3).

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[1] It has been decided that "Certificated Air Carrier Services" means only scheduled *inter*state and international traffic. *City of Dallas v. Continental Airlines, Inc.*, 735 S.W.2d 496 (Tex.App. – Dallas 1987, writ denied).

[2] When Congress enacted the ADA, there was a specific discussion regarding DFW Airport, Love Field, and the Concurrent Ordinance. Mr. Anderson, the ADA's Floor

In 1979, Southwest applied under a short-lived portion of the ADA, called the Automatic Market Entry Program, to fly between Love Field and New Orleans. [Pet.App. 3] CAB granted the application after concluding it had no power to deny it. [Pet.App. 3]

To avoid further litigation, Dallas, Fort Worth, the DFW Airport Board, and Southwest Airlines agreed to a compromise whereby the cities would allow limited interstate service from Love Field to the four states contiguous to Texas (the "perimeter rule"). To insure CAB would not take action inconsistent with the compromise, Congress enacted the "Wright Amendment,"[3] which embodies the perimeter rule agreed to by the parties. [Pet.App. 3] The Wright Amendment prohibits the CAB/DOT from certificating interstate flights at Love Field, subject to certain exceptions for which certification is permissible (commuter and charter flights, grandfathered flights, and flights to the four contiguous states). [Pet.App. 3-4]

In an earlier decision, the Fifth Circuit found that Congress enacted the Wright Amendment "pursuant to its rational decision to maintain the agreement between Dallas and Fort Worth." *Cramer v. Skinner,* 931 F.2d 1020, 1032 (5th Cir.), *cert. denied,* 502 U.S. 907 (1991). The Conference Report on the Wright Amendment acknowledges that it "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort

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Manager, stated that services at Love Field would not be authorized if inconsistent "with the plan of the . . . Ordinance." 124 CONG. REC. 30,670 (1978).

[3] International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980).

Worth, DFW Airport authority and related constituent groups." H.R. CONF. REP. NO. 96-716 at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78, 86. The Conference Report further provides: "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act [now 49 U.S.C. § 41713(b) of the ADA] apply to the authority to serve Love Field on interstate flights authorized by the amendment." *Id.* at 26, 1980 U.S.C.C.A.N. at 88.

The four-state perimeter rule in the Wright Amendment governed the operations at Love Field for almost twenty years. In 1997, however, Congress passed the "Shelby Amendment," which amended the Wright Amendment in two limited respects.[4] [Pet.App. 5-6] First, the Shelby Amendment added Alabama, Mississippi, and Kansas to the four contiguous states listed in paragraph (c) of the Wright Amendment. The Shelby Amendment also provided a new definition for the phrase "passenger capacity of 56 passengers or less" within the "commuter airline exception" contained in paragraph (a)(2) of the Wright Amendment. That exception now allows DOT to certificate large aircraft "reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56."

Even before the Shelby Amendment was enacted, several airlines announced they would institute non-stop passenger service from Love Field to points beyond the four contiguous states. [Pet.App. 7] Because Dallas was

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[4] Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).

unwilling to enforce the four-state perimeter rule, on October 10, 1997, Fort Worth filed a declaratory action in Texas state court against Dallas, the DFW Airport Board, and Legend Airlines.[5] [Pet.App. 7] Fort Worth asked the court to declare that Dallas is obligated by the Concurrent Ordinance to limit flights at Love Field to points within Texas and the four contiguous states. Dallas, Legend and Continental defended by claiming Dallas's obligations had been preempted by federal law.

By Partial Summary Judgment dated October 15, 1998, the state court ruled that neither the ADA nor the Wright and Shelby Amendments preempt Dallas's ability to enforce the perimeter rule at Love Field. [Pet.App. 7, 178] The state court's judgment was made final December 16, 1998. [Pet.App. 178] Dallas, Legend and Continental appealed the judgment to the Texas Court of Appeals for the Second District, which temporarily stayed the appeal so that it might consider any immediate opinion issued by the Fifth Circuit in the proceeding described below. [Pet.App. 7] However, prior to the Fifth Circuit's decision, the Texas appellate court lifted its stay and is currently reviewing the state court's final judgment.

On January 31, 2000, in response to Legend's public announcement that it would violate the state court's final judgment, Fort Worth requested the state court to issue injunctive relief against Legend. Fort Worth withdrew its request, however, after DOT filed a federal lawsuit

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[5] *City of Fort Worth v. City of Dallas, et al.*, 48th District Court, Tarrant County, Texas, Cause No. 48-171109-97. Continental Airlines and Continental Express were later added as defendants. American Airlines intervened as a plaintiff.

against Fort Worth seeking emergency injunctive relief to enforce the orders issued in the proceeding described below. DOT requested the federal court to enjoin Fort Worth from enforcing its state court judgment, and to compel Fort Worth to dismiss its state court lawsuit. DOT's federal lawsuit is still pending.

C. The Proceedings Below.

From the moment the state court litigation began, DOT was kept apprised of its progress by several of the state court litigants. Several parties attempted to persuade DOT to intervene in the state court action. [Pet.App. 15, 16 n.5, 22 n.8, 54] Instead, on August 25, 1998, almost one year after the state court litigation began, DOT commenced an interpretation proceeding to decide the same legal issues. [Pet.App. 8, 16 n.5] On December 22, 1998, DOT issued Declaratory Order 98-12-27, which conflicted with the Texas court's prior judgment. [Pet.App. 8-9, 16 n.5, 53]

Several parties, including Fort Worth, petitioned the Fifth Circuit to review DOT's order pursuant to 49 U.S.C. § 46110. On February 1, 2000, the Fifth Circuit issued its opinion denying the petitions for review and affirming Order 98-12-27. [Pet.App. 1]

REASONS FOR GRANTING THE PETITION

I.

THERE IS AN URGENT NEED FOR THE COURT TO DEFINE AN AIRPORT PROPRIETOR'S RIGHTS UNDER THE AIRLINE DEREGULATION ACT.

The ADA provides for federal preemption of States' and municipalities' *regulatory* and *police* powers, but expressly exempts from preemption the *proprietary* powers and rights of local airport proprietors. 49 U.S.C. § 41713(b); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 637 n.14 (1973) (distinguishing between police and proprietary powers). Through this provision, "Congress expressly provided that the proprietary powers and rights of municipal airport owners are not preempted by federal law." *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 982 (9th Cir. 1991).

The Fifth Circuit acknowledged that the ADA allows an airport operator to impose "reasonable, nonarbitrary and nondiscriminatory" restrictions to advance a local interest. [Pet.App. 34] The court concluded, however, that the ADA does not permit the allocation of traffic between two airports for the purpose of maintaining one as a short-haul airport or to protect the financial integrity of another airport. [Pet.App. 37]. The Fifth Circuit's judgment creates a conflict with prior opinions of the Colorado Supreme Court and Second Circuit, which recognize that airport proprietors may implement rules to protect one airport from another in the same regional system.

Most recent is the Colorado Supreme Court's opinion in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998), which the

Fifth Circuit acknowledged as a conflicting decision. [Pet.App. 36]. There, the court upheld a prohibition on passenger service at Centennial Airport that was intended to prevent competition with Denver International.[6] That case, like the present one, involved local planning that designated Centennial as a reliever airport for Denver's primary airport, Denver International. Finding that the local regulation was not preempted, the court explained:

> [W]e believe that an airport proprietor's ban on scheduled passenger service falls squarely within the proprietor's exception . . . [A] ban on scheduled service seeks to accomplish a more fundamental goal in setting the boundaries of permissible operations at the airport. The power to control an airport's size exists at the core of the proprietor's function. . . .

Id. at 595-96.

The other leading decision is *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, in which the Second Circuit decided the exact statutory issue presented here: whether the ADA's proprietary rights exception permits a local airport proprietor to impose a perimeter rule designed to allocate long-haul and short-haul traffic among multiple airports. 817 F.2d 222 (2d Cir. 1987), *aff'g* 658 F. Supp. 952 (S.D.N.Y. 1986), *cert. denied*, 485 U.S. 1006 (1988).

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[6] The FAA subsequently issued a contrary opinion on the issues in *Arapahoe*, which is being reviewed by the Court of Appeals for the Tenth Circuit. *Arapahoe County Pub. Airport Auth. v. FAA*, Case No. 99-9508. Oral argument is scheduled for March 2000.

As proprietor of LaGuardia, JFK, and Newark International, the Port Authority established a perimeter rule at LaGuardia prohibiting non-stop flights beyond 1,500 miles. The stated purpose for the rule was "to reduce ground congestion and ***maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to Kennedy and Newark.***" *Western Air Lines, Inc.*, 658 F. Supp. at 953 (emphasis added).

The district court held that the perimeter rule serves "[a] legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor." *Id.* at 958. In words appropriate here, the court wrote:

> Here, as in *City of Houston*, there is in issue a multi-airport system. The effect of the perimeter rule in each case is to divert air traffic from one airport to another within the respective systems, and not to close down metropolitan area runways to all air traffic to or from points outside the perimeter.[7]

Id. at 957-58. Affirming the lower court's "well reasoned opinion," the Second Circuit concluded that perimeter rules fall squarely within the proprietary rights exempted in 49 U.S.C. § 41713(b)(3). 817 F.2d at 226.

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[7] In *City of Houston v. FAA*, 679 F.2d 1184, 1188, 1195-96 (5th Cir. 1982), the Fifth Circuit held that the ADA did not prevent the FAA, as proprietor of Washington National and Dulles, from imposing a perimeter rule at National ***to assure full utilization of Dulles and to preserve the short- and medium-haul nature of National.***

For similar reasons, the perimeter rule at Love Field has a reasonable basis: to protect DFW Airport and bond purchasers from the loss of revenue that would be siphoned away by a resurgence of interstate flights at Love Field. Although the Fifth Circuit concluded that the "reallocation of flights between airports [is not] a goal in and of itself," [Pet.App. 37-38], a stated purpose of the restrictions in *Western Air Lines* and *City of Houston* was to allocate short-haul service to one airport and long-haul service to another airport to prevent competition. Likewise, a primary purpose of the ban on passenger service in *Arapahoe County* was to prevent competition between Centennial and Denver International.

As the Colorado Supreme Court observed, local planning is consistent with the ADA, which indicates a willingness to cooperate with and defer to the type of regional aviation planning at issue in this case. *Arapahoe County*, 956 P.2d at 594; *see* 49 U.S.C. § 40101(a)(8); 49 U.S.C. § 47101(g). The ADA provides that it is the goal of Congress to encourage "air transportation at major urban areas through secondary or satellite airports *if* consistent with regional airport plans of regional and local authorities. . . . " 49 U.S.C. § 40101(a)(8) (emphasis added).

DOT's actions in other parts of the nation demonstrate the continuing concern it has for the harm that results when two neighboring airports compete for the same services. By letter dated June 23, 1998, DOT instructed the Central West Virginia Regional Airport Authority that the "new airport for this region would be the only provider of scheduled passenger service, consolidating the current service at Charleston and Huntington." DOT wrote, "The airports at Charleston and

Huntington, in this scheme, would continue to provide general aviation and corporate services." DOT stated that "this assumption was identified as critical to the success of a new airport. . . . "

Similarly, by letter dated May 24, 1999, DOT advised the City of Austin that the FAA would enforce the city's obligation to close Mueller Airport upon the opening of Bergstrom Airport. In familiar words, the Department wrote:

> As you know, the City of Austin agreed to closure of Austin Mueller Airport upon the opening of Bergstrom, as a condition of the FAA's approval of and investment in the new airport. ***That agreement was memorialized in . . . city bond covenants; and in agreements with air carriers serving Austin.***
>
> There were several reasons for this condition. First, ***the two airports are relatively close together, and there is a conflict in the airspace needed for unrestricted operations at both airports***. . . .
>
> Second, ***the commitment to public investment and private financing for the new Bergstrom Airport required that the new airport not be in competition with a nearby facility for airport services and limited resources.***

(Emphasis added).

Finally, the Fifth Circuit apparently did not consider the Wright and Shelby Amendments in its analysis of the ADA. [Pet.App. 39 n.17] However, in the conference report accompanying the Wright Amendment, Congress

expressly stated that the proprietary rights provision of the ADA applies to Love Field:

> The conferees state that the preemption and ***proprietary rights provisions*** of the Federal Aviation Act, sections 105(a) and (b), respectively [now 49 U.S.C. 41713(b)(1),(3)], ***apply to the authority to serve Love Field*** on interstate flights authorized by the amendment.

H.R. CONF. REP. No. 96-716, at 26 (1979) (emphasis added). Accordingly, Dallas's proprietary rights under the ADA are coextensive with every other airport proprietor's in the United States.

Indeed, the purpose of the Wright Amendment was not to mandate flights at Love Field, but to prevent CAB/DOT from certificating flights inconsistent with the cities' agreement. Likewise, the Shelby Amendment merely redefined the "commuter exception" of the Wright Amendment to allow for certification of large aircraft reconfigured to have fifty-six seats or less. Certification of these flights has no preemptive effect. The ADA's proprietary rights provision states, "This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport ***served by an air carrier holding a certificate issued by the Secretary of Transportation*** from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3). Congress therefore made clear that airport proprietors may exercise their proprietary rights regardless of whether certificated air carriers serve their airports.

The Fifth Circuit's narrow interpretation of proprietary rights deviates significantly from prior decisions,

from the policies underlying the ADA, and from DOT's practices in other parts of the country. There is an imperative need for the Court to resolve this conflict and construe the ADA as Congress intended, not as DOT has done.

II.

THE FIFTH CIRCUIT'S DECISION THAT THE AIRLINE DEREGULATION ACT PREEMPTS SELF-IMPOSED CONTRACTUAL OBLIGATIONS BETWEEN AIRLINES AND AIRPORT OPERATORS CONFLICTS WITH THIS COURT'S DECISION IN *AMERICAN AIRLINES, INC. V. WOLENS.*

The Fifth Circuit's decision that the ADA preempts self-imposed contractual obligations between the DFW Airport Board and many of the airlines serving DFW Airport is at odds with this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995). [Pet.App. 43-47] The contracts at issue are "Use Agreements" that some, but not all, airlines serving DFW Airport have executed. In exchange for reduced lease rates and landing fee discounts, the airlines have agreed to use DFW Airport for all their interstate flights in North Texas. Under this Court's holding in *Wolens*, these consensual agreements are not preempted by the ADA.

In *Wolens*, the Court was presented the issue of whether American Airlines' obligations under its frequent flyer program were preempted by the ADA. The Court held that the ADA preempted the plaintiffs' ***tort*** claim for deceptive practices, but did not preempt the breach of ***contract*** claim concerning the frequent flier program. *Id.* at 232-233.

The Court reasoned that if the plaintiffs sought to enforce a contract American entered into voluntarily, that claim should not be regarded as enforcement of state law, but rather as enforcement of American's own "self-imposed undertakings." *Id.* The Court concluded:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings.
>
> * * *
>
> The ADA . . . was designed to promote 'maximum reliance on competitive market forces.' Market efficiency requires effective means to enforce private agreements . . . As stated by the United States: 'The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.'

Id. at 228-230 (citations omitted). Thus, if a plaintiff seeks to recover for "the airline's alleged breach of its own, self-imposed undertakings," or for the airline's breach of "a term the airline itself stipulated," enforcement of that claim will not constitute enforcement of state law. *Id.* at 228, 232.

The Fifth Circuit interpreted *Wolens* much too narrowly, concluding the Court's reasoning does not apply where one of the parties to the contract is a governmental entity, such as the DFW Airport Board. [Pet.App. 45 n.22] Nothing in *Wolens* suggests the Court would limit its holding to contracts between purely private parties.

In a similar situation, this Court distinguished between regulatory and nonregulatory state activity in the context of the preemption provision of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* In *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 113 S. Ct. 1190 (1993), the Court held that bid specifications, although implemented by the Commonwealth of Massachusetts, were not government "regulations" preempted by the NLRA:

> When we say that the NLRA preempts state law, we mean that the NLRA prevents a State from regulating within a protected zone. . . . A State does not regulate, however, simply by acting within [that protected zone]. ***When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to State regulation.***
>
> Our decisions in this area support the distinction between government as regulator and government as proprietor.

Id. at 226-227 (emphasis added).

Fort Worth requests the Court to grant this petition and confirm its holding in *Wolens* that self-imposed contractual obligations are not preempted by the ADA.

III.

THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERALISM, NAMELY WHETHER 28 U.S.C. § 1738 OR COMMON LAW RULES OF PRECLUSION PREVENT A FEDERAL ADMINISTRATIVE AGENCY FROM RELITIGATING SPECIFIC LEGAL ISSUES PREVIOUSLY DECIDED BY A STATE COURT.

A. Whether 28 U.S.C. § 1738 Applies to Federal Administrative Agencies?

Pursuant to 28 U.S.C. § 1738, federal courts must give state court decisions the same preclusive effect they would have in the state of decision. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373, 116 S. Ct. 873, 877 (1996). This rule applies whether the state court judgment is civil or criminal, and whether it construes state or federal law. *Allen v. McCurry*, 449 U.S. 90, 104, 101 S. Ct. 411, 419-420 (1980).

There is a compelling need for this Court to decide an issue of first impression: whether section 1738 also applies to federal administrative agencies, or, instead, whether federal agencies can provide a forum for dissatisfied state court litigants to relitigate issues of federal law. There is presently a disagreement among federal courts as to whether section 1738 should apply to federal agencies. *Compare Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 20-21 (1st Cir. 1997) (holding that the policies behind section 1738 apply to federal agencies); *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993); *Midgett v. United States*, 603 F.2d 835, 845 (Ct. Cl. 1979); *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967), *with NLRB v. Yellow*

Freight Systems Inc., 930 F.2d 316, 320 (3d Cir. 1991) (holding that NLRB was not required to give preclusive effect to a state court judgment).

Prior to the decision below, the most recent opinion on the subject was the First Circuit's in *Bath Iron Works Corporation*. 125 F.3d at 20-21. There, the court opined:

> [R]espect for a prior judgment is mandated by the full faith and credit clause, U.S. Const. art. IV, § 1, or its statutory counterpart, 28 U.S.C. § 1738. A literal reader might doubt that either has much to do with the present case, because . . . the former constrains states, not federal entities, and the latter is directed explicitly to federal courts and says nothing about federal agencies. But the policy arguments for similar treatment-especially avoidance of duplicative litigation-tend to be the same.

Id. Before that, in *Deerfield*, the Second Circuit held that the FCC could not disregard the ruling of a federal court, even though the federal court had simply complied with section 1738 and given preclusive effect to a state court ruling on federal issues. 992 F.2d at 428.

The Fifth Circuit erred when it summarily concluded that Section 1738 did not obligate DOT to accord full faith and credit to the state court's judgment.[8] [Pet.App. 17-19] The court did not mention, much less distinguish, the circuit court decisions in *Deerfield* or *Bath Iron Works*. As for the opinions in *Midgett* and *Torres*, the Fifth Circuit

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[8] Under Texas law, the state court's judgment is entitled to preclusive effect even while on appeal. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

said it could not conclude with certainty that those courts relied on section 1738. [Pet.App. 17 n.6] In *Midgett*, however, the court expressly stated, "Section 1738 of 28 U.S.C. imposes on a federal court presented with a state court judgment the same force and conclusive effect as it has in the state in which it is rendered. Administrative bodies of the United States as well as courts are required to adhere to this requirement." 603 F.2d at 845.

Equally problematic is the Fifth Circuit's conclusion that section 1738 is inapplicable to federal agencies because it only refers to "courts". [Pet.App. 17] That fact is of little significance since section 1738 antedates the development of administrative agencies. In a similar context, this Court recognized that agency findings of one state could bind another state's agency under the full faith and credit clause, even though that provision speaks only in terms of "judicial" proceedings. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281, 100 S. Ct. 2647, 2661 (1980).

B. Whether the Department of Transportation Was Bound by Common Law Rules of Preclusion?

Alternatively, this Court should decide whether DOT was bound by federal common-law rules of preclusion to honor the prior state court judgment. *See University of Tennessee v. Elliott*, 478 U.S. 788, 794, 106 S. Ct. 3220, 3224 (1986) ("[W]e have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute."). The Fifth Circuit recognized that such rules apply to agencies, but concluded that considerations of repose and federalism were outweighed by the interest in

having DOT interpret federal aviation law. [Pet.App. 19-22]

The flaw in the Fifth Circuit's reasoning is that DOT could have offered its interpretation of federal law in many ways less intrusive than commencing its own proceeding one year after the state court action. It could, for example, have instituted its proceeding as soon as it learned of the state court action in October 1997. [Pet.App. 16 n.5] It could have intervened in the state court action, or submitted an *amicus curiae* brief to the state trial or appellate courts.[9] [Pet.App. 16 n.5] Finally, DOT could have offered its views to this Court when the issues surrounding Love Field reached final review from the state court system, as it did in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-229, 115 S. Ct. 817, 824 (1995) (considering DOT's *amicus curiae* brief on the ADA).

Consequently, DOT did not have to instigate this unseemly conflict between the state and federal court systems. In the past, this Court has acknowledged that rules of preclusion are fundamental to maintaining comity between the state and federal systems. *Allen v. McCurry*, 449 U.S. 90, 95-96, 101 S. Ct. 411, 415 (1980) ("[R]es judicata and collateral estoppel not only reduce unnecessary litigation . . . but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."). For these reasons, Fort Worth requests the Court to grant this petition and

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[9] As the Fifth Circuit noted, "presumably, if the federal interests were that important, DOT would have taken one of these actions." [Pet.App. 22 n.8]

reconfirm the right of state courts to decide federal law issues.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 99-60008

AMERICAN AIRLINES, INCORPORATED; CITY OF DALLAS, TEXAS; SOUTHWEST AIRLINES COMPANY; LOVE FIELD CITIZENS ACTION COMMITTEE,

Petitioners,

versus

DEPARTMENT OF TRANSPORTATION,

Respondent.

No. 99-60239

THE CITY OF FORT WORTH; DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,

Petitioners,

versus

DEPARTMENT OF TRANSPORTATION,

Respondent.

Petitions for Review of an Order of the
U.S. Department of Transportation

(Filed Febr. 1, 2000)

Before DUHÉ, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This consolidated appeal involves respondent Department of Transportation's ("DOT's") interpretation of federal law governing airline service at Love Field airport. Petitioners Dallas-Fort Worth International Airport Board ("DFW Board"), City of Fort Worth ("Fort Worth"), American Airlines, Inc. ("American"), City of Dallas ("Dallas"), Southwest Airlines Company ("Southwest"), and Love Field Citizens Action Committee (the "Committee") petition for review of DOT's declaratory, procedural, and reconsideration orders. Legend Airlines, Inc. ("Legend"), Continental Airlines, Inc. ("Continental") and Continental Express, Inc. ("Continental Express") have intervened. For the reasons set forth below, we affirm.

I

Prior to 1968, Dallas and Fort Worth operated independent and competing airports. One of Dallas's airports was Love Field. DOT's predecessor agency, the Civil Aeronautics Board ("CAB"), found that the competition between Dallas's and Fort Worth's airports was harmful. Accordingly, in 1964 CAB ordered the cities to build a jointly-operated airport that would serve as the region's primary airport. The cities responded by creating the DFW Board and by jointly adopting the 1968 Regional Airport Concurrent Bond Ordinance (the "Ordinance"). The Ordinance authorized the issuance of bonds to finance the Dallas-Fort Worth Airport ("DFW"). Of critical importance here is section 9.5 of the Ordinance, which contained the cities' agreement to "take such steps as

may be necessary, appropriate and legally permissible . . . to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the [DFW] Regional Airport."

The eight CAB-certified air carriers who were using the Dallas and Fort Worth airports first signed "letter agreements" and then later signed "use agreements" with the DFW Board, agreeing to move their air services to DFW as specified in the Ordinance. Southwest, which was solely running intrastate flights from Love Field and thus was exempt from CAB certification and pressure, refused to move to DFW and did not sign a use agreement. Litigation ensued over efforts to force Southwest from Love Field, terminating with our statement that "Southwest Airlines Co. has a federally declared right to the continued use of and access to Love Field, so long as Love Field remains open." *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 103 (5th Cir. 1977).

Congress deregulated the airline industry in 1978. Shortly thereafter, Southwest applied for permission to provide interstate service between Love Field and New Orleans. CAB granted the application, concluding that it lacked power to deny it. This prompted Congress to intervene by enacting the Wright Amendment. *See* Pub.L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980). The Wright Amendment generally bans interstate service from Love

Field.[1] However, it provides certain exemptions from this ban, two of which are significant here: (1) the commuter

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[1] In its entirety, the Wright Amendment states:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979 may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service

airline exemption allows interstate "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less"; and (2) the contiguous state exemption allows flights to and from Louisiana, Arkansas, Oklahoma, and New Mexico, if the flights do not "provide any through service or ticketing with another air carrier" and do not "offer for sale transportation to or from . . . any point which is outside any such State." *Id.*

In 1996, Dalfort Aviation, the parent corporation of Legend, announced plans to take advantage of the commuter airline exemption by reconfiguring large commuter planes to hold only 56 seats. In response, the DOT General Counsel issued an opinion holding that the exemption applied only to aircraft originally configured to seat less than 57 passengers. The DOT opinion was mooted by the 1997 passage of the "Shelby Amendment" (collectively with the Wright Amendment, the "Love Field amendments"). The Shelby Amendment defined the term

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or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979.

Id.

"passenger capacity of 56 passengers or less" in the commuter airline exemption to "include[ ] any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56." *See* Pub.L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).[2] The Shelby

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[2] The Shelby Amendment provides in its entirety that:

> (a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".
>
> (c) SAFETY ASSURANCE. – The Administrator of the Federal Aviation Administration shall monitor the safety of flight operations in the Dallas-Fort Worth metropolitan area and take such actions as may be necessary to ensure safe aviation operations. If the Administrator must restrict aviation operations in the Dallas-Fort Worth area to ensure safety, the Administrator shall notify the House and Senate Committees on Appropriations as soon as possible that an unsafe airspace management situation existed requiring the restrictions.

Id.

Amendment also expanded the contiguous states exemption to allow direct flights between Love Field and airports within Kansas, Alabama, and Mississippi. *See id.*

The parties in this case responded in various ways to the Shelby Amendment. Southwest began offering flights between Love Field and Mississippi and Alabama. Legend has announced plans to offer longhaul service to states outside the Love Field service area using large aircraft reconfigured to have less than 57 seats. Continental Express plans to use regional jets with less than 57 seats to fly between Love Field and Cleveland. Continental Express and American offer intrastate flights from Love Field to their hubs, in Houston and Austin respectively.

In response, Fort Worth sued Dallas, the DFW Board, Legend, Continental, and Continental Express in Texas state court to block the proposed additional service from Love Field. The state court found that the Ordinance was not preempted by federal law and that Dallas was obligated by the Ordinance to preclude airlines from flying between Love Field and areas outside Texas and the four-state service area authorized by the Wright Amendment. The state action is currently on appeal, although the state appellate court has stayed the appeal pending our resolution of this case.

While the state court action was pending, Dallas filed a federal suit against DOT and Fort Worth requesting declaratory relief on essentially the same issues involved in the state action. The federal court has stayed that proceeding pending resolution of the instant case.

At the urging of several of the parties, and while both the federal and state actions were pending, DOT initiated the interpretative proceeding that is the subject of this petition for review. DOT issued an order informing the parties in this action[3] that it intended to rule on four "federal law issues" and allowing the parties an opportunity to submit comments on these issues. Subsequently, in response to the parties' initial comments, DOT issued a procedural order which, *inter alia*, granted the DFW Board's request to resolve a fifth legal issue and granted several parties' request for an extension of time in which to file comments.

DOT ultimately issued a "Declaratory Order" resolving the five questions it had set forth. Specifically, DOT ruled that:

> (i) the City of Fort Worth may not enforce any commitment by the City of Dallas . . . to limit operations at Love Field authorized by federal law, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law; (ii) the ability of the City of Dallas to limit the type of airline service operated at Love Field is preempted by the Wright and Shelby Amendments; (iii) any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds may operate service with any type of equipment and flights of any length from or to Love Field, notwithstanding any claim that such

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[3] Notice of this order was not sent to the Committee. The Committee subsequently learned of the proceeding and DOT granted its request for an extension of time to file comments.

> service violates any agreement between the Cities of Dallas and Fort Worth; (iv) the Dallas-Fort Worth International Airport Board may not enforce any contract provision that allegedly bars an airline from operating interstate airline service at another airport in the Dallas-Fort Worth metropolitan area; and (v) any airline may offer through service between Love Field and any other point to passengers using a flight between Love Field and another point within Texas operated under subsection (a) of the Wright Amendment, as amended by the Shelby Amendment. . . .

Declaratory Order at 58. In an accompanying "Procedural Order," DOT rejected various procedural objections raised by the parties. DOT subsequently reaffirmed its rulings on reconsideration.

II

We have jurisdiction to review DOT's declaratory order by this petition for review. *See* 49 U.S.C. § 46110(e) ("[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . may apply for review of the order by filing a petition for review in the . . . court of appeals of the United States for the circuit in which the person resides or has its principal place of business."). The standard of review we apply differs according to the specific action DOT took. Our review of DOT's interpretation of the statutes it is charged with administering is governed by the two-step standard of review established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). We first determine whether

Congress directly spoke to the precise question in issue. If the intent of Congress is clear, then we, and the agency, must give effect to the unambiguously expressed intent of Congress. *See id.* at 842-43, 104 S. Ct. at 2781, 81 L. Ed. 2d at ___. If Congress has not directly addressed the precise question in issue, we ask whether the agency's interpretation was "based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2782, 81 L. Ed. 2d at ___. As long as the agency's construction of an ambiguous statute is permissible, it must be upheld. *See id.*; *Texas Oil & Gas Assoc. v. EPA*, 161 F.3d 923, 937-38 (5th Cir. 1998).

However, we only engage in the *Chevron* analysis when reviewing an agency's interpretation of a statute it was charged with administering. When reviewing DOT's interpretation of a statute it is not charged with administering, we do not grant DOT *Chevron* deference. *See American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) ("We do not, however, accord *Chevron* deference to EPA's interpretation of the ESA, because the ESA is not a statute that EPA is charged with administering.").

III

Several of the parties challenge DOT's declaratory order on procedural grounds. They argue that: (a) DOT violated the Administrative Procedure Act ("APA"), (b) its order improperly contravened the earlier state court ruling on the same issues, and (c) DOT failed to comply with environmental requirements before issuing its order.

A

Fort Worth and the DFW Board argue that DOT's ruling violated the APA in various ways. *See* 5 U.S.C. § 706 (directing a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law"). Although DOT has already rejected some of these challenges in its earlier rulings, we review *de novo* DOT's interpretation and application of the APA. *See Professional Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) ("The Supreme Court has indicated, however, that reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer.").

1

Several parties contend that DOT failed to provide them with sufficient notice as required under § 554(b) or, alternatively, § 553, of the APA. We exercise plenary review over whether DOT complied with applicable procedures. *See Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 198 (5th Cir. 1989).

DOT issued its declaratory order after conducting an informal adjudication, pursuant to its authority under § 554(e) to "issue a declaratory ruling to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); *see also Texas v. United States*, 866 F.2d 1546, 1555 (5th Cir. 1989) ("The ICC's declaratory order was issued after an informal adjudication pursuant to the authority conferred by 5 U.S.C. § 554(e) to 'issue a declaratory ruling to

terminate a controversy or remove uncertainty.' Rendered in a specific factual context and resolving only the questions presented by [the petitions], it 'belongs to the genre of adjudicatory rulings.' ") (citations omitted). Several parties object to DOT's failure to adhere to the APA's notice requirements for formal adjudications. However, in the absence of a statute requiring an agency to conduct its adjudication "on the record after opportunity for agency hearing," 5 U.S.C. § 554(a), an agency can define its own procedures for conducting an informal adjudication. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655-56, 110 S. Ct. 2658, 2680-81, 110 L. Ed. 2d 563, ___ (1990).

While the APA does not expressly require notice in informal adjudications, courts have inferred a requirement that there be "some sort of procedures for notice [and] comment . . . as a necessary means of carrying out our responsibility for a thorough and searching review [of agency action]." *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 923 (D.C. Cir. 1982). Here, DOT issued an order in which it specified the legal issues on which it would rule, allowed the parties to submit comments on these issues, and extended the comment period at the request of several parties. It then ruled on precisely the issues that it identified. We find that DOT's actions satisfied the minimum procedural notice requirements. *See id.*

Fort Worth contends that DOT failed to comply with § 554(b) by neglecting to notify parties that DOT would also be considering a factual issue: the effect of increased service at Love Field on DFW Airport. This argument fails for two reasons. First, as noted, the formal notice

requirement of § 554(b) does not apply to an informal adjudication. Second, the parties were effectively on notice of this issue since it was one that they could reasonably expect to arise given the issues of which DOT gave notice. *Cf. Boston Carrier Inc. v. Interstate Commerce Comm'n*, 746 F.2d 1555, 1559 (D.C. Cir. 1984) ("The Commission is not burdened with the obligation to give every applicant a complete bill of particulars as to every allegation that carrier will confront."). The fact that Dallas, Continental Express, and Legend all submitted factual evidence to DOT should also have put Fort Worth on notice that it could submit its own factual evidence.

We also note the absence of anything in the record to indicate that Fort Worth possesses any information bearing on the impact of increased service at Love Field. Fort Worth has had three opportunities to present or identify such evidence – during the comment period, in its motion for reconsideration, and in its brief on appeal – but has not demonstrated that it possesses relevant factual information not considered by DOT. This continued failure to identify the evidence it would have submitted indicates that Fort Worth was not prejudiced by any inadequacy in DOT's notice. *See* 5 U.S.C. § 706 (in reviewing an agency determination, "due account shall be taken of the rule of prejudicial error"); *Friends of Iwo Jima v. Nat'l Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999) ("Moreover, the party who claims deficient notice bears the burden of proving that any such deficiency was prejudicial.").

We also reject the DFW Board's argument that DOT's order amounts to a substantive rule subject to the notice

and comment provision of § 553. Agencies have discretion to choose between adjudication and rulemaking as a means of setting policy. *See NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294, 94 S. Ct. 1757, 1771, 40 L. Ed.2d 134, ___ (1974); *Mobil Exploration and Producing North America, Inc. v. FERC*, 881 F.2d 193, 198 (5th Cir. 1989) (citing Bell Aerospace). In determining whether an agency action constituted adjudication or rulemaking, we look to the product of the agency action. We also accord significant deference to an agency's characterization of its own action. *See British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 992 (D.C. Cir. 1977) ("In the present case we have, moreover, the Board's own assertion that its order is purely interpretive, and this contention in itself is entitled to a significant degree of credence. . . . While declaratory orders differ in some respects from interpretive rules, the same rationale should apply equally to an agency's characterization of one of its rulings as a declaratory order."). Since the APA defines "adjudication" as the "agency process for formulating an order," 5 U.S.C. § 551(7), and DOT classifies its ruling as a declaratory order, we find that the agency engaged in adjudication rather than rulemaking. Furthermore, because DOT's order interpreted the rights of a small number of parties properly before it, DOT did not abuse its discretion by acting through an adjudicatory proceeding. *See British Caledonian Airways*, 584 F.2d at 992-94; *Mobil Exploration*, 881 F.2d at 199 (finding no abuse of discretion where, *inter alia*, an agency proceeded by adjudication to resolve an issue affecting a small number of parties).

Fort Worth, joined by American, also argues that it was deprived of its right to a fair agency determination because of *ex parte* contacts between Continental Express, Legend, and DOT. Fort Worth cites specific instances when Continental Express and Legend officials contacted DOT about the pending state and federal court actions and asked DOT to intervene in these actions. The officials suggested specific actions which DOT could take and strongly advocated for DOT's intervention, including by characterizing the state court proceedings in unfavorable terms. DOT responded at one point with a written letter answering four questions posed by Continental. DOT and Legend do not dispute that the contacts took place, but they both argue that the contacts were proper and did not bias DOT's final decision.

DOT regulations prohibit certain *ex parte* contacts between agency personnel and interested parties.[4] *See* 14 C.F.R. § 300.2(a). Most of the contacts here fall outside these regulations because they occurred before DOT instituted its interpretation proceeding. *See* 14 C.F.R. § 300.2(a) ("[T]here shall be no substantive communication in either direction between any concerned DOT employee and any interested person outside DOT, concerning a *public proceeding*, until after final disposition of

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[4] Fort Worth also relies on the APA ban on *ex parte* communications, but this ban does not apply here, because it does not cover informal adjudications. *See* 5 U.S.C. § 557(a), (d) (stating that the prohibition on *ex parte* contacts applies "when a hearing is required to be conducted in accordance with section 556 "); *id.* § 556 (governing formal hearings).

the proceeding.") (emphasis added); *id.* § 300.2(b)(4)(v) (defining a public proceeding as a "proceeding initiated by a docket filing, other than a petition for generally applicable rulemaking, *after the filing in the docket of an identifiable written opposition to the initiating document*") (emphasis added). Additionally, most of the contacts, including those which occurred after DOT initiated its proceeding, did not involve the merits of the proceedings but rather were permissible requests to intervene in the state and federal action. *See Texas*, 866 F.2d at 1550 (finding that an individual's request for the Interstate Commerce Commission to intervene in a pending state action was not an *ex parte* communication because it did not involve the merits of the case).

B

The posture of the case presents more serious procedural concerns. DOT and the state court issued contrary rulings on some of the same issues in proceedings involving some of the same parties.[5]

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[5] Although the state and DOT proceedings overlapped, neither tribunal made significant efforts to accommodate the views of the other. The state court essentially gave DOT one month to issue its declaratory order and when DOT failed to do this, the state court ruled without the benefit of DOT's views. DOT, on the other hand, did not issue its declaratory order within the time set by the state court, did not attempt to intervene in the state court action even though some of the parties there asked it to intervene, and did not ask the state court to stay its ruling until DOT ruled on the same issues. Instead, DOT rejected the state court's view in its order, noting only the state court's lack of reasoning in support of its position.

Consequently, Fort Worth, the DFW Board, and American (collectively "Fort Worth petitioners") ask us to reverse DOT's action because (1) DOT violated the full faith and credit statute, 28 U.S.C. § 1738, by not granting preclusive effect to the prior state court ruling, and (2) DOT violated the Anti-Injunction Act and corresponding common law principles of federalism by issuing a declaratory order affecting a case currently pending before a state court. DOT rejected these arguments in its earlier rulings, but we do not defer to DOT's ruling on these issues. *See American Forest and Paper Ass'n*, 137 F.3d at 297.

1

The full faith and credit statute, 28 U.S.C. § 1738, generally requires federal courts to grant preclusive effect to state court judgments: "[t]he records and judicial proceedings of any court of any . . . State . . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." *Id.* The plain language of this section establishes that it does not apply here: § 1738 applies only to "every *court* within the United States," and DOT is an agency, not a "court." *Id.* (emphasis added). The only other circuit to address fully this issue agrees with this reading of § 1738.[6] *See NLRB v.*

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[6] The Fort Worth petitioners rely on two district court cases which have arguably held to the contrary. In *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967), the court stated in passing that "[t]he Administrative agencies of the United States are no less bound that he [sic] courts of the United States to give full faith and credit to the decisions of the Courts of Puerto Rico." *Id.* at 4.

Yellow Freight Systems, Inc., 930 F.2d 316, 320 (3d Cir. 1991) (finding that the NLRB, by virtue of its status as an agency rather than a court, was not required to give full faith and credit to an earlier state court judgment); *cf. Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 n.5 (D.C. Cir. 1986) ("We agree with the FERC, though, that

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The court did not cite § 1738, and thus it might have relied instead on the common law preclusion doctrines we discuss below. In *Midgett v. United States*, 603 F.2d 835 (Ct. Cl. 1979), the court cited *Torres* and stated: "Section 1738 of 28 U.S.C. imposes on a federal court presented with a state court judgment the same force and conclusive effect as it has in the state in which it is rendered. Administrative bodies of the United States as well as courts are required to adhere to this requirement." *Id.* at 845 (citation omitted). The court did not clearly indicate that it based its holding on § 1738, as opposed to merely analogizing to § 1738.

We cannot conclude with certainty whether these cases relied on § 1738. To the extent they did, we believe the better rule, for the reasons stated above and herein, is that § 1738 does not apply to agencies, but the rationale underlying § 1738 extends to agencies through common law preclusion doctrines. This rule is consonant with Supreme Court precedent and the plain text of § 1738, and it accounts for the concerns raised by the *Midgett* and *Torres* courts.

Fort Worth also argues that *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980) addresses the question presented here. In *ITT Rayonier*, the Ninth Circuit held that the Environmental Protection Agency ("EPA") was bound by res judicata from pursuing an enforcement action when a prior enforcement action had been litigated in state court. *See id.* at 999-1004. The Ninth Circuit applied res judicata because it found that the EPA was in privity with the parallel state agency which had pursued the state enforcement action. *See id.* at 1002-04. *ITT Rayonier* is distinguishable from the present case, because Fort Worth has made no showing that DOT was in privity with any party in the state court action.

'[t]he fact that the state court ruled on the same issue, regardless whether its ruling agreed with the Commission's ruling, does not affect the Commission's authority to determine its own jurisdiction.' ").

The Supreme Court adopted this plain reading of § 1738 when presented with the question of whether a federal court must accord full faith and credit to an unreviewed state agency proceeding. *See University of Tennessee v. Elliott*, 478 U.S. 788, 794, 106 S. Ct. 3220, 3224, 92 L. Ed. 2d 635, ___ (1986). Reading § 1738's references to "courts" as not including "agencies," the *Elliott* court concluded simply that " § 1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative factfinding at issue in this case." *Id.* at 794, 106 S. Ct. at 3224, 92 L. Ed. 2d at ___.

Finding that § 1738 does not apply to agencies does not end our inquiry, however, as courts "have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute." *Id.* at 794, 106 S. Ct. at 3224, 92 L. Ed. 2d at ___. The Supreme Court fashioned such a rule in *Elliott*, requiring federal courts to grant preclusive effect to findings of fact by state agencies in most subsequent federal actions. *See id.* at 796-99, 106 S. Ct. at 3224-26, 92 L. Ed. 2d at ___ (holding also that no preclusive effect should be given to state administrative agency factfinding in Title VII cases). To determine whether common law preclusion should apply here, we consider whether the policies favoring full faith and credit, including repose and federalism concerns, *see generally Allen v. McCurry*, 449 U.S. 90, 95-96, 101 S. Ct. 411, 415, 66 L. Ed. 2d 308, ___ (1980) ("[R]es judicata and

collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."), outweigh the federal interests present here, *see Midgett*, 603 F.2d at 845 ("A judgment or decree of a state court whose effect would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in a federal court."); *cf. Yellow Freight*, 930 F.2d at 320 (discussing policy reasons why an agency should not be bound by § 1738). *See generally American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972) (suggesting, in *dicta*, that § 1738 can be trumped by "well-defined [competing] federal policies"); 18 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4469, at 662-63 (1981) ("In various settings, federal courts have found that vital federal interests warrant rejection of the res judicata rules that state courts would apply to their own judgments.").

Applied here, the competing policy considerations weigh against requiring DOT to grant preclusive effect to the state court proceeding.[7] *Cf. Yellow Freight*, 930 F.2d at

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[7] Because we resolve the matter on these grounds, we do not reach DOT's alternative argument that the state court judgment should not be granted preclusive effect because a Texas court would not grant the judgment preclusive effect. *See generally Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 374, 116 S. Ct. 873, 878, 134 L. Ed. 2d 6, ___ (1996) ("When faced with a state court judgment relating to an exclusively federal claim, a federal court must first look to the law of the rendering State to ascertain the effect of the judgment.").

320-22 (holding that the NLRB was not bound by an earlier arbitrator's factfinding, even though the arbitrator's ruling was affirmed by a state court, because essential evidence was not presented to the arbitrator). First, the importance of repose here, while not insubstantial, is limited by the posture of this case. At the time the state court issued its ruling, parallel agency proceedings were already underway.

Second, this case involves aviation regulation, an area where federal concerns are preeminent and where DOT is charged with representing those concerns. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366-67 (1994) ("The Secretary of Transportation is charged with administering the federal aviation laws. . . . "); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303, 64 S. Ct. 950, 956, 88 L. Ed. 1283, ___ (1944) (Jackson, J., concurring) ("Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive."), *quoted in City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633-34, 93 S. Ct. 1854, 1860, 36 L. Ed.2d 547, ___ (1973); 849 U.S.C. § 46101(a)(2) (granting the Secretary of Transportation discretion to "conduct an investigation . . . about . . . any question that may arise under this part"). Additionally, this case involves the operation of flights from Love Field, a matter on which Congress has twice specifically legislated. DOT's interpretive order is the first time that DOT, the agency specifically charged with administering the Wright Amendment, has interpreted the Shelby Amendment. *See Cramer v. Skinner*, 931 F.2d 1020, 1024 (5th Cir. 1991) (noting that "[t]he individual defendants

in their official capacity, DOT, and DOT's Office of Aviation Analysis enforce the [Wright] amendment"); *State of Kansas v. United States*, 16 F.3d 436, 438 (D.C. Cir. 1994) (same). To allow the state court effectively to foreclose the administering agency from further consideration of the Shelby Amendment as to the parties which appeared before the state court would trump the key federal interests that motivated Congress to create DOT and give it authority over these laws.[8]

Finally, applying full faith and credit principles to DOT in this case would lead to inconsistent results. *Cf. Access Telecommunications v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (noting that the primary jurisdiction doctrine, under which courts refer matters to agencies when the matters are within agency jurisdiction, is motivated in part by the desire "to promote uniformity and consistency within the particular field of regulation"). Some of the parties before DOT are litigating these issues for the first time. Forcing DOT to grant preclusive effect to the state court ruling would lead to inconsistent application of the Shelby Amendment to the parties that did not appear before the state court.

In sum, because of the important federal interests here, we decline to hold that common law preclusion

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[8] These key federal interests are arguably lessened by the fact that DOT did not attempt to stay or intervene in the state court action; presumably if the federal interests were that important, DOT would have taken one of these actions. DOT's inaction is partially justified by the limited amount of time it had to intervene, as the state court only stayed the proceedings before it for one month.

doctrines apply in this case. Instead, DOT properly declined to give preclusive effect to the state court judgment.[9]

2

The Fort Worth Petitioners also argue that DOT's actions violated the Anti-Injunction Act, 28 U.S.C. § 2283, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress,

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[9] We reject the Fort Worth petitioners' invocation of the so-called *Rooker-Feldman* doctrine for the same reasons. "In a nutshell, the doctrine holds that inferior federal courts do not have the power to modify or reverse state court judgments." *Matter of Reitnauer*, 152 F.3d 341, 343 (5th Cir. 1998) (applying the doctrine where "[t]he district court . . . made apparent its displeasure with the manner in which the state court interpreted and applied state law [and] such displeasure formed the basis for its reversal of the bankruptcy court's order."). As we have previously noted, the *Rooker-Feldman* doctrine is "very close if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment." *Gauthier v. Continental Diving Servs., Inc.*, 831 F.2d 559, 561 (5th Cir. 1987). Thus, we have not applied the *Rooker-Feldman* jurisdictional bar in cases where we have found it inappropriate to require a federal court to give full faith and credit to a state court judgment. *See id.* (not applying the *Rooker-Feldman* doctrine where full faith and credit does not apply because the state court judgment would not be entitled to preclusive effect under state law). We follow this practice here. The Fort Worth petitioners have not cited any cases where the *Rooker-Feldman* doctrine has been applied to an agency ruling on matters of federal law previously addressed by a state court. In light of the above-noted concerns, we see no reason to extend the doctrine to this context.

or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. We "follow the weight of authority in holding that [i]f an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988) (*en banc*) (quotation omitted) (alteration in original); *see also Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776 (5th Cir. 1993) ("[T]he district court may not consider the merits of the declaratory judgment action when 1) a declaratory defendant has previously filed a cause of action in state court against the declaratory plaintiff, 2) the state case involves the same issues as those involved in the federal case, *and* 3) the district court is prohibited from enjoining the state proceedings under the Anti-Injunction Act.") (emphasis in original).

As a federal agency, DOT's proceedings are exempt from the terms of § 2283, which applies only to proceedings in a "court of the United States." 28 U.S.C. § 2283; *see also id.* § 451 ("As used in this title [,][t]he term 'court of the United States' includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior."). Further, even where an action is ongoing in a "court of the United States," an agency's presence as a party, together with the federal interest the agency represents, can trump the application of § 2283. *See Mitchum v. Foster*, 407 U.S. 225, 235-36, 92 S. Ct. 2151, 2158-59, 32 L. Ed. 2d 705, ___ (1972) ("[A] third exception

[to § 2283], more recently developed permits a federal injunction of state court proceedings when the plaintiff in the federal court is the United States itself, or a federal agency asserting 'superior federal interests.' "); *Texas v. United States*, 837 F.2d 184, 186 (5th Cir. 1988) ("Moreover, because a federal agency seeks the injunction, the ICC's motion is not directly precluded by the strictly enforced rule of the Anti-Injunction Act, 28 U.S.C. § 2283."); *United States v. Lemaire*, 826 F.2d 387, 388 n.2 (5th Cir. 1987) ("The Act does not prevent the United States, or one of its agencies, from acting to protect a federal interest."). Thus, § 2283 does not restrict our ability to review the agency's decision.

Fort Worth's authority to the contrary is unavailing. The case before us is clearly distinguishable from *United Credit Bureau of America, Inc. v. NLRB*, 454 U.S. 994, 102 S. Ct. 539, 70 L. Ed. 2d 404 (1981) (Rehnquist, J., dissenting from denial of certiorari), where then-Justice Rehnquist dissented from the denial of certiorari to argue that "the concerns of federalism and comity comprehended by the Anti-Injunction Act should . . . apply to the NLRB." *Id.* at 997-98, 102 S. Ct. at 541, 70 L. Ed. 2d at ___.[10] In *United Credit*, the NLRB ordered a party to dismiss a state court action. It did this without "consider[ing] whether the state-court proceeding interfered with its ability to consider or dispose of [the agency petitioner's] charges." *United Credit*, 454 U.S. at 998, 102 S. Ct. at 541, 70 L. Ed. 2d at ___ (noting that the state court had not yet acted).

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[10] We note in passing that, as a denial of a petition for certiorari, the *United Credit Bureau* opinion is not binding authority. *See Teague v. Lane*, 489 U.S. 288, 296 (1989).

Here, the state court action, at least at the trial level, was completed, thus lessening DOT's intrusion and strengthening its reasons for issuing its own interpretation of the legal issues. Also, DOT's interest here is not its interest in resolving an individual petitioner's claim, as in *United Credit*, but rather its interest in avoiding piecemeal application of a federal aviation statute.

Additionally, we do not believe that DOT violated general principles of federalism by issuing its ruling. Although the Fort Worth Petitioners correctly note that state courts are competent to resolve matters of federal law, this does not prevent federal agencies from acting within their authority to protect federal interests. Accordingly, the cases that the Fort Worth Petitioners cite in support of their federalism arguments are clearly distinguishable. *See, e.g., Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 339 (5th Cir. 1999) (holding that a district court properly remanded a state law claim after dismissing federal claims, even though one of the state law claims involved a preemption defense, because "state courts, being of equal dignity with federal courts, are equally competent to address that potential defense").

C

As a final procedural objection, the Committee argues that DOT improperly ruled without first preparing an environmental impact statement ("EIS"). The National Environmental Policy Act ("NEPA") directs "all agencies of the Federal Government . . . [to] include [an EIS] in

every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2). DOT found that it did not need to prepare an EIS, but because it is not charged with administering NEPA, its decision to not prepare an EIS is not entitled to deference. *See American Forest and Paper Ass'n*, 137 F.3d at 297.

The Committee argues that DOT's "decision" to allow increased flights constitutes a "major Federal action" under NEPA. We disagree. Agency decisions which "do not entail the exercise of significant discretion" do not require an EIS. *Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1344-45 (5th Cir. 1979). By enacting the Shelby Amendment, Congress, not DOT, made the decision to allow additional flights at Love Field. DOT merely issued an interpretation of federal law that it was required to adopt under the relevant statutes.[11] *See Sugarloaf Citizens Ass'n*

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[11] For example, 49 U.S.C. § 41713, which DOT interpreted here, does not grant DOT discretion because Congress has defined the extent of federal preemption and has specified which state rights remain. On the other hand, when DOT applies § 41714(c), governing the award of slots to new entrants, DOT is clearly granted discretion by the statute. *See* 49 U.S.C. § 41714(c) ("If the Secretary *finds it to be in the public interest and the circumstances to be exceptional*, the Secretary *may* by order grant exemptions from the requirements under subparts K and S of part 93 of title 14, Code of Federal Regulations, to enable new entrant air carriers to provide air transportation at high density airports.") (parentheticals omitted and emphasis added). Thus, when applying § 41714, DOT follows NEPA. *See, e.g., Applications of Trans States Airlines, Inc.*, DOT Order 98-4-21,

v. FERC, 959 F.2d 508, 513 (4th Cir. 1992) ("Other Circuits have held that when an agency has no discretion to consider environmental values implementing a statutory requirement, its actions are ministerial and not subject to NEPA."); *Goos v. ICC*, 911 F.2d 1283, 1296 (8th Cir. 1990) ("Because the ICC has not been granted any discretion under section 1247(d) to base its issuance of an NITU or CITU on environmental consequences, we agree that it would make little sense to force the ICC to consider factors which cannot affect its decision. . . . "); *Milo Community Hospital v. Weinberger*, 525 F.2d 144, 147 (1st Cir. 1975) (finding that no EIS was necessary where "consideration of the factors that the appellant has characterized as 'environmental considerations' could not have changed the Secretary's decision.").[12]

1998 DOT Av. LEXIS 159, at *54-*55 (1998) (conducting an environmental assessment in a § 41714 determination).

[12] The Committee also argues that DOT failed to follow its own environmental procedures. The Committee relies on an FAA statement of "Polices [sic] and Procedures on Considering Environmental Impacts" which, as DOT notes, is inapplicable here because it "establishes Federal Aviation Administration (FAA) policies and procedures." DOT was not acting under the auspices of the FAA in this case. Instead, DOT asserts that the relevant DOT guidelines still require major agency action before undertaking an EIS, and we agree. *See* 44 Fed. Reg. 56420, 56424 (1979) ("An EIS shall be prepared for any proposed major Federal action significantly affecting the environment."); *see also id.* (requiring an environmental assessment when "a decision has not been make [*sic*] to prepare an EIS," but noting that the environmental assessment describes "the environmental impacts of a proposed action"). The Committee does not cite any contrary authority in its reply brief.

IV

The Declaratory Order stated that DOT intended to rule on four "federal law issues." DOT's subsequent Procedural Order added a fifth legal issue to the agency's docket. We review each of DOT's rulings in turn.

A

We first turn to DOT's ruling that the preemption provision of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), preempted Dallas's and Fort Worth's obligations under the Ordinance. In reaching this decision, DOT also determined that Dallas's rights as the proprietor of Love Field did not permit it to bar airlines from operating the services authorized under the Shelby Amendment. On appeal, the Fort Worth Petitioners argue that the power to restrict services at Love Field falls within Dallas's rights as proprietor of the airport. Thus, they argue, Dallas has an existing contractual obligation to restrict service at Love Field so as to block airlines from operating the services permitted under the Shelby Amendment.

1

The ADA includes an express preemption provision, § 41713(b)(1), which generally prohibits states from enacting or enforcing a law or regulation "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). At the same time, the ADA reserves the state's authority to carry out its "proprietary powers and rights." 49 U.S.C.

§ 41713(b)(3) (hereinafter, the "proprietary powers exception").

The proper standard of review to apply to DOT's preemption determination is the subject of extensive debate and briefing among the parties. It is also an issue of first impression before us. The Fort Worth Petitioners contend that DOT's interpretation of the proprietary powers exemption should be afforded no deference because DOT lacks both the authority and the expertise to interpret this section of the ADA. DOT, Dallas, and Continental Express argue that DOT's general authority to administer the ADA inherently includes the power to administer the statute's preemption provision. Consequently, they argue for deferential review of DOT's preemption determination under *Chevron*.

The Fort Worth Petitioners present several strong arguments in favor of *de novo* review. A preemption determination does indeed involve legal determinations, which are arguably more within the expertise of the courts. *See Colorado Public Utilities Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991) (adopting a *de novo* standard of review because "[a] preemption determination involves matters of law-an area more within the expertise of courts than within the expertise of the Secretary of Transportation."). In reaching its decision, DOT interpreted existing case law, a role more typically – and perhaps more appropriately – left to the courts. Beyond this, the task of defining what constitutes a "proprietary power" has traditionally been left to the courts. *See, e.g., National Helicopter Corp. of America v. City of New York*, 137 F.3d 81 (2d Cir. 1998) (assessing the validity of restrictions on operation at a heliport). Additionally, Congress appears to

have evinced an intent to codify the proprietary rights existing when the ADA was enacted rather than an intent to allow DOT to define proprietary rights. *Cf. Western Air Lines v. Port Authority of New York and New Jersey*, 658 F. Supp. 952, 956 (S.D.N.Y. 1986) ("The legislative history of Section 1305(b)(1) indicates that the airport proprietor would be permitted to take those actions 'presently accepted as valid exercises of proprietary powers.' ") (internal citation omitted).

DOT, however, presents strong arguments supporting the contrary position. DOT is charged with administering the aviation laws as a whole. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366-67 (5th Cir. 1994) ("The Secretary of Transportation is charged with administering the federal aviation laws. . . . "). More significantly, DOT is the "superintending agency" with respect to the administration of the ADA. *See American Airlines v. Wolens*, 513 U.S. 219, 229 n.6, 115A S. Ct. 817 n.6, 824, 130 L. Ed. 715, ___ (1995). The First Circuit has come close to holding that this power encompasses the authority to interpret the preemption section of the ADA. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 167 (1st Cir. 1989) (finding that DOT was one of "two judicial actors with apparent jurisdiction over the [preemption] subject matter which they decided"). Absent any clear evidence to the contrary, we are nearly persuaded that DOT possesses the authority to interpret the preemption provision of the ADA and that, consequently, we should defer to its interpretation of that provision. *See Texas Oil & Gas Ass'n*, 161 F.3d at 937. We need not, however, make this final determination here. Because we conclude that DOT's ruling that § 41713 of

the ADA preempted the Ordinance was correct under either standard of review, we decline to decide this issue at this time.

2

Congress passed the ADA in 1978 in an effort both to end federal economic regulation of commercial aviation and to promote competition within the airline industry. Fearful that in the face of federal deregulation, states would enact conflicting laws regulating the airline industry, Congress enacted § 41713(b)(1) of the ADA, which provides that:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1); *see also New England Legal Foundation*, 883 F.2d at 173 ("In reducing federal economic regulation of the field . . . Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation."). When enacting the ADA, however, Congress also recognized that airport proprietors – the majority of which are municipalities, *see City of Burbank*, 411 U.S. at 635, 93 S. Ct. at 1860, 36 L. Ed.2d at ___ – were best equipped to handle local problems arising at and around their facilities. Accordingly, the ADA provides that the preemptive effect of § 41713(b)(1) does "not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an

airport . . . from carrying out its proprietary powers and rights." 49 U.S.C.A. § 41713(b)(3).

The restrictions on service at Love Field under the Ordinance appear to operate as limitations "relating to . . . routes" within the meaning of § 41713(b)(1), *see Western Air Lines*, 658 F. Supp. at 952 (finding that a perimeter rule "relat[ed] to routes"), and the parties present no significant argument to the contrary. Consequently, the only issue before us is whether the power to enforce the restrictions falls within the proprietary powers exception. The Fort Worth petitioners contend that the restrictions on service at Love Field fall within Dallas's proprietary powers.

The precise scope of an airport owner's proprietary powers has not been clearly articulated by any court. *See, e.g., id.* at 956 ("The extent of 'proprietary powers and rights' has not yet been established."). However, several courts have examined when an airport owner's enactment of a "perimeter rule"[13] or similar route restriction falls within the proprietary powers exception. These courts have recognized that local proprietors play an "extremely limited" role in the regulation of aviation. *See,*

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[13] An airport perimeter rule "establish[es] maximum permissible distances of non-stop flights into and out of a given airport." *See* Jonathan Whitman Cross, *Airport Perimeter Rules: An Exception to Federal Preemption*, 17 Transp. L.J. 101, 102 (1988). The Wright Amendment itself, by allowing interstate service to only the four states bordering on Texas, operates as a perimeter rule. Similarly, because § 9.5 of the Bond Ordinance has been enforced so as to allow the range of flights permitted under the Wright Amendment, it effectively operates as a perimeter rule.

e.g., *id.* at 956 ("[A]irport proprietors have an 'extremely limited role' in the system of aviation regulation. . . . ") (quoting *British Airways Bd. v. Port Auth.*, 564 F.2d 1002, 1010 (2d Cir. 1977)). In defining the permissible scope of a proprietor's power to regulate under § 41713(b)(3), federal courts have repeatedly held that an airport proprietor can issue only "reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest." *Id.* at 958; *see also National Helicopter Corp. of America*, 137 F.3d at 88-89 (limiting the permissible subject matter of local regulations to "aircraft noise and other environmental concerns at the local level"); *British Airways*, 558 F.2d at 84 (stating that a proprietor "is vested only with the power to promulgate reasonable, non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs."); *cf. City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1990) ("Congress made it clear, however, that the power delegated to airport proprietors to adopt noise control regulations is limited to regulations that are not unjustly discriminatory.").

Courts applying this standard have upheld route restrictions as within proprietary powers when they are targeted at advancing a specific local interest. To date, courts have permitted airport proprietors to enact regulations aimed at monitoring noise levels, *see Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981), tempering environmental concerns, *see National Helicopter of America*, 137 F.3d at 88, and managing congestion, *see Western Air Lines Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222 (2d Cir. 1987). *See*

generally Cross, 17 Transp. L.J. at 106 ("An airport authority's proprietary function permits it to enact regulations benefitting citizens who live near the airport, such as airport noise regulations or airport curfews."). In each of these cases, the proposed restriction was targeted at alleviating an existing problem at the airport or in the surrounding neighborhood. For example, in *Western Air Lines*, the Second Circuit upheld a 1,500-mile perimeter rule enacted by the Port Authority at LaGuardia Airport as a reasonable means both of alleviating congestion at LaGuardia and of preserving the shorthaul status of that facility. *See Western Air Lines*, 817 F.2d at 226. More recently, the Second Circuit considered the validity of a special use permit that imposed significant restrictions on the use of a local heliport. *See National Helicopter Corp.* 137 F.3d 81. Finding that the proprietor exception allowed municipalities only to promulgate " 'reasonable, nonarbitrary and non-discriminatory' regulations of noise and other environmental concerns at the local level," *id.* at 88, the Second Circuit upheld only the restrictions that were aimed at reducing noise or other environmental concerns at the heliport. Significantly, the court struck down the restriction on sightseeing routes, finding that "Congress, the Supreme Court, and we have consistently stated that the law controlling flight paths through navigable airspace is completely preempted." *Id.* at 92.[14]

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[14] In *City of Houston*, we touched upon the proprietary rights exception when we upheld the FAA's authority to enact a 1,000-mile perimeter rule at Washington National Airport. In that case, the FAA enacted the rule as a means of limiting traffic at National, preserving the short-haul status of National and assuring the utilization of the flagging Dulles Airport nearby. In

The only case which might support the Fort Worth Petitioners' view of Dallas's proprietary powers at Love Field is *Arapahoe County Public Airport v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). To the extent that *Arapahoe* holds that it is within an airport owner's proprietary powers to restrict service at a local airport without articulating a viable purpose for the restriction, we view that case as deviating from the generally accepted rule that we adopt here. In *Arapahoe*, the Colorado Supreme Court-without finding any purpose for the restriction beyond the proprietor's bald assertion that it would "strip" the airport Authority "of its ability and authority to manage the Airport," *see id.* at 591-upheld a municipal proprietor's ban on all passenger service at Centennial Airport, *see id.* at 595. We fear that under the rationale of *Arapahoe*, virtually any regional regulation enacted by a proprietor would fall within the proprietary powers exception. This would expand the regulatory role of municipal owners far beyond the "extremely limited role" envisioned by the ADA.[15]

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relying on *City of Houston* for support, the Fort Worth Petitioners overlook the fact that we explicitly avoided engaging in a full analysis of the preemption provision in that case. Rather, we found that since the ADA preempted *state* regulation of routes, the restrictions of § 41713 did not apply to the FAA, a branch of the federal government. Thus, our decision in *City of Houston* does little to advance the Fort Worth Petitioners' argument.

[15] *Arapahoe* is also factually distinguishable from the present case. First, while in *Arapahoe*, the court found that the ban on passenger service did not constitute a restriction on "rates, routes or services" within the meaning of the ADA, the restrictions under the Ordinance clearly amount to route

We are not persuaded by the Fort Worth Petitioners' attempt to fit the restrictions at Love Field into the existing federal case law defining the scope of proprietary rights. On its face, the Ordinance is clearly not aimed at alleviating noise, pollution, or congestion at Love Field, nor do the Fort Worth Petitioners assert such claims. Rather, they extract from *Western Air Lines* and *City of Houston* an overly broad rule that it is within an airport owners' proprietary powers to allocate traffic between two airports so as to preserve the shorthaul nature of one facility. Such a contention misses the import of both cases; that a proprietor can enact a perimeter rule *if it articulates a need for the restriction*. The Fort Worth Petitioners seem to overlook the *Western Air Lines* court's repeated emphasis that the primary goal of the restriction was to reduce congestion at LaGuardia, and the allocation of traffic between LaGuardia and Kennedy Airports was a means of attaining this goal. The court specifically held that "a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor." *Western Air Lines*, 658 F. Supp. at 958. Similarly, to the extent that *City of Houston* touched upon

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restrictions. Second, the passenger service at issue in *Arapahoe* had never been permitted at Centennial Airport. In reaching its conclusion, the court emphasized that "[t]he power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or even contemplated." *Arapahoe*, 956 P.2d at 595. In contrast, passenger flights on planes of all sizes have long been permitted at Love Field.

the scope of proprietary powers, we spent the bulk of our opinion emphasizing the fact that allocation of flights between Dulles and National was necessary to encourage use of Dulles Airport and ameliorate the overuse of National. *See City of Houston*, 679 F.2d at 1187. In neither case was re-allocation of flights between airports a goal in and of itself.

The fact that the restrictions in the Ordinance do not advance a local interest articulated in prior case law is not dispositive of this issue. We do not limit the scope of proprietary rights to those which have been previously recognized. *Cf. Western Air Lines*, 658 F. Supp. at 957 ("Section 1304(b)(1) [recodified as 41713(b)(1)] does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind."). Thus, we are open to assessing whether the restrictions in the Ordinance are reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest. The Fort Worth petitioners fail, however, to offer a viable alternative justification for the route limitations that might support extending the recognized scope of a proprietor's powers under § 41713(b)(3). To allow enforcement of the Ordinance under the proprietary powers exception extends that exemption beyond its intended limited reach.[16]

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[16] Finally, we need not reach the question of whether there is a "multi-airport proprietor" requirement in either the case law or the ADA such that a local proprietor can only enact route restrictions that allocate between two airports if it owns both facilities. Since we find that the restrictions at issue here are impermissible regardless of ownership, the issue of whether

In sum, reviewing DOT's ruling *de novo*, we affirm the agency's determination that § 41713(b)(1) of the ADA preempted the Ordinance's restrictions on operations at Love Field. Clearly, under the less stringent *Chevron* review, DOT's interpretation of the preemption provision would also be reasonable. Under either standard, DOT's interpretation is affirmed.[17]

B

We next review DOT's ruling that the Wright Amendment's "commuter aircraft exemption" authorized carriers using jets with passenger capacity of 56 seats or less to engage in long-haul service from Love Field to any city in the United States. DOT ruled and argues on appeal that the "commuter aircraft exemption" imposes no geographical limitation on the service that can be provided with smaller aircrafts and therefore authorizes longhaul service at Love Field with any aircraft with a capacity of less than 57 passengers. Not surprisingly, intervenors Continental Express and Legend Airlines-each of whom plan to offer longhaul service out of Love Field on regional or reconfigured jets-agree with this position. The Fort Worth Petitioners contend that DOT misinterpreted the Love Field amendments and that the exemption authorizes only short-haul service at Love Field.

Dallas controls both Love Field and DFW is irrelevant to our analysis.

[17] DOT alternatively ruled that the Wright and Shelby Amendments impliedly preempt the cities' ability to enforce the Ordinance. Because we find that the amendments expressly preempt enforcement of the Ordinance, we decline to address this issue here.

Because the DOT is authorized to administer the Wright and Shelby Amendments, *see Continental Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1449 (5th Cir. 1988) ("Here, Congress fashioned a specific provision which the agency (once CAB, now DOT) has been called upon to interpret."), we review its decision under the two-step *Chevron* analysis.

This inquiry most logically begins with a review of the statutory text. Subsection (a)(2) of the Wright Amendment exempts from the general ban against interstate flights at Love Field "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less." § 29, 94 Stat. at 48. Section (a) of the Shelby Amendment defines the term "passenger capacity of 56 passengers or less" to include "any aircraft . . . reconfigured to accommodate 56 passengers or fewer if the total number of passenger seats installed on the aircraft does not exceed 56." § 377(a), 111 Stat. at 1447. A plain reading of these provisions appears to permit longhaul service at Love Field on a commuter airline with a passenger capacity of fewer than 57.[18]

The slightly more complicated issue here is what type of aircraft is covered under the "commuter airline"

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[18] In interpreting the commuter airline exemption in this manner, we keep in mind that Congress enacted the Love Field amendments with the intention of preserving Love Field as a primarily shorthaul facility. *Cf. Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991). We are, however, persuaded by DOT's argument that this interpretation will not undermine Love Field's status as a primarily short-haul airport since both the Wright and Shelby Amendments still place significant restrictions on the long-haul service permitted on larger jets.

exemption. DOT interpreted the commuter airline exemption as applying to any aircraft – whether a "regional jet" or turboprop plane – with a capacity of 56 passengers or less. Legend, Southwest, and Continental Express agree with this interpretation. The Fort Worth Petitioners, on the other hand, argue that the exemption in subparagraph (a)(2) of the Wright Amendment applies only to "commuter aircrafts" and not to regional jets. These differing views, in addition to Congress's failure to define the term "commuter airline," persuade us that the meaning of that term is ambiguous. *See Continental Air Lines*, 843 F.2d at 1454 ("The language of the [commuter airline exemption] is, we are persuaded, ambiguous."). Consequently, we turn to step two of *Chevron* and assess the reasonableness of DOT's interpretation.

The Fort Worth Petitioners contend that DOT erred in failing to interpret the phrase "commuter airline" as a limitation on the commuter aircraft exemption. As an initial matter, to the extent that American attempts to resurrect the argument that the term "commuter airlines" cannot refer to an air carrier offering longhaul service, we agree with and adopt the rationale of the District of Columbia Circuit in *Continental Air Lines*, 843 F.2d 1444. In that case, the court upheld as reasonable DOT's interpretation of the commuter airlines exemption as restricting the type of aircraft that could operate unrestricted service at Love Field rather than the class of airlines that could operate longhaul services at the facility. *See id.* at 1454-55.

Fort Worth presents a different argument, namely, that the term "commuter" limits the type of aircraft to the kind of turboprop aircrafts that were in use at the time

the Wright Amendment was enacted. Regional jets, it contends, "cannot qualify as 'commuter' aircraft." We disagree. First, Congress chose not to define "commuter airline" by reference to the kind of planes with a limited passenger capacity in 1979 and we decline to define that term for it here. *Cf. Continental*, 843 F.2d at 1454 ("First, Congress might have defined 'commuter airlines' with greater specificity by explicitly incorporating definitional references to agency regulations, but it chose not to do so. We cannot say that Congress meant to incorporate those regulatory definitions absent indications of its intention to do so in the statute or the legislative history."). Furthermore, to impose such a definition would essentially penalize those airlines who chose to update their technology as the airline industry advanced over the past twenty years.

Second, the Fort Worth Petitioners' definition of a "commuter airline" essentially renders the Shelby Amendment meaningless. The City of Fort Worth's contention that "the Shelby Amendment merely permits the use of reconfigured jet aircraft *if* the aircraft otherwise qualifies as a *commuter* aircraft" is nonsensical since, under its own definition of a "commuter airline," a reconfigured jet would *never* qualify as a commuter plane.[19]

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[19] The Fort Worth Petitioners also argue that DOT's interpretation violates the agency's previous ruling that Congress enacted the Wright Amendment in an effort to limit operations at Love Field to shorthaul service. In reality, Congress always permitted limited longhaul service at Love Field. From its inception, the Wright Amendment allowed for limited longhaul service on aircrafts with limited capacity and, as stated above, we do not think that DOT's ruling will radically alter Love Field's status as a primarily shorthaul airport.

The more rational view is that the term "operating aircraft with a passenger capacity of 56 passengers or less" as defined by the Shelby Amendment, defines the term "commuter airlines" so as to include all planes weighing less than 300,000 pounds, including regional jets, with a passenger capacity of less than 57. Thus, our reading of the commuter aircraft exemption therefore leads us to conclude that DOT's interpretation of the commuter aircraft exemption as permitting carriers using jets with a 56-passenger capacity to engage in longhaul service at Love Field is reasonable.

C

DOT found that, "[f]or the same reasons [the cities could not directly limit services from Love Field], the DFW Board may not prohibit or limit an airline's use of a competing airport" through the use agreements. DOT Order 98-12-27 at 52. Continental Express agrees with this ruling,[20] while the DFW Board, Dallas, and Fort Worth argue that the use agreements are not preempted. We again need not decide whether we must defer to DOT's

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[20] American filed a request to intervene and a request to file an intervenor's brief that conditionally supports DOT's ruling on the use agreement issue. Legend subsequently moved to strike American's proposed intervenor brief. American's request to intervene is untimely, *see* Fed. R. App. P. 15(d), and American has not shown that we should treat its proposed intervenor brief as a supplemental brief under 5th Circuit Local Rule 28.5. Accordingly, we DENY American's motions to intervene and to file a brief as an intervenor and DENY as moot Legend's motion to strike American's intervenor brief.

ruling on this point because we would uphold it even if we reviewed it *de novo*.

In determining whether government contracts are subject to preemption, the case law distinguishes between actions a state or municipality takes in a proprietary capacity – actions similar to those a private entity might take – and actions a state or municipality takes that are attempts to regulate. The former type of action is not subject to preemption while the latter is. For example, in *Building & Trades Council v. Associated Builders*, 507 U.S. 226, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993), the Supreme Court held that a labor contract was not preempted by the National Labor Relations Act because it was not "government regulation" but rather "constitute[d] proprietary conduct." *Id.* at 232, 113 S. Ct. at 1199, 122 L. Ed. 2d at ___. More recently, in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas*, 180 F.3d 686 (5th Cir. 1999), we considered whether a municipal ordinance and a contract entered into pursuant to that ordinance were preempted as "law[s], regulation[s], or other provision[s] having the force and effect of law." *Id.* at 691. Analyzing the contract and the ordinance in the same manner, we held that neither was preempted because both were valid exercises of proprietary power rather than impermissible attempts to regulate. *See id.* at 693-94; *see also Associated Gen. Contractors of America v. Metropolitan Water Dist. of S. Cal.*, 159 F.3d 1178, 1182-83 (9th Cir. 1998) (holding that labor contracts between a state entity and private groups were not "laws" because they were not efforts to regulate but rather "reflect[ed] an owner's desire to contractually assure peace and prosperity on particular projects").

Thus, the critical inquiry here is whether the use agreements represent a valid exercise of the cities' proprietary powers. This question is easily resolved. The use agreements are essentially coextensive with the Ordinance, indicating in their breadth an intent to achieve everything achieved by the Ordinance. *Cf. Cardinal Towing*, 180 F.3d at 694 (looking to the scope of the contract and the activity it covered to determine whether it represented an attempt to regulate). They were enacted to effect the Ordinance, and the most recent version of the agreements directly links the airlines' obligations to the terms of the Ordinance: "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth areas to, from and at the Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance."[21] Given this overlap, for the same reasons we have already determined that the Ordinance is preempted as an improper attempt to regulate, we must determine that the use agreements are preempted as an impermissible attempt to regulate in an area where the federal government has preempted state regulation.[22] *See Skydiving Center of Greater*

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[21] Earlier versions of the use agreements and the original letter agreements contain similar language.

[22] Thus, this case is distinguishable from the Supreme Court's recent decision in *Wolens*, where the Court addressed a class action by passengers against an airline over changes the airline made to its air-miles program. *See Wolens*, 513 U.S. at 224-25, 115 S. Ct. at 822, 130 L. Ed. 2d at ___. The Court first found that the passengers' state consumer protection act claims were preempted by federal law, because their claims related to "rates" and "services." *See id.* at 228, 115 S. Ct. at 823-24, 130 L. Ed. 2d at ___. The Court proceeded to find, however, that the

Washington, D.C., Inc. v. St. Mary's County Airport Comm'n, 823 F. Supp. 1273, 1284 (D. Md. 1993) (finding that when federal law preempted a municipal corporation's ban on off-site parachute landings, it also preempted lease provisions between the corporation and the skydiving center that incorporated this ban by reference).

The parties favoring the use agreements contend that even if the use agreements were preempted, the signatories waived their preemption rights by voluntarily entering into the agreements. DOT rejected this argument by finding that any waiver was invalid as violative of public policy. *See, e.g., Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 900-01 (1945) (noting "that a statutory right conferred on

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plaintiffs could still pursue contractual claims against the airlines because, unlike the consumer protection statute, the contracts were "privately ordered obligations" which "did not amount to a State's enact[ment] or enforce[ment] [of] any law." *Id.* at 228-29, 115 S. Ct. at 824, 130 L. Ed. 2d at ___ (quotations omitted) (alterations in original). It based this finding in part on the fact that "[m]arket efficiency requires effective means to enforce private agreements." *Id.* at 230.

As several of the parties note, *Wolens* is distinguishable from this case because it did not involve a contract entered into by a state. Instead, the contracting parties in *Wolens* were private actors. Thus, the only question of state regulation in *Wolens* was the more tangential question of whether the contract could be enforced in state court. *See id.* at 229 n.5, 115 S. Ct. at 824 n.5, 130 L. Ed. 2d at ___.

Additionally, although *Wolens* referred to the importance of contracts in ensuring "market efficiency," there has been no convincing showing here that the parties entered into the use agreements for this purpose. Instead, it seems that they entered into the use agreements to implement an agreement between the cities to regulate airport use in the Dallas-Fort Worth area.

a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy," and holding that in the case before it, employees could not waive their private rights to liquidated damages because of the public interest at stake).

We need not address the waiver issue because we find it inapplicable here. Section 41713 does not expressly announce affirmative rights for airlines, but instead bars states from regulating in certain areas. The airline signatories cannot "waive" this preemption because there is no indication that the federal preemption is limited to granting them individual rights. *Cf. Niswonger v. American Aviation, Inc.*, 411 F. Supp. 769, 771 (E.D. Tenn. 1975) (holding, without analysis, that "[t]he lease indenture of June 16, 1969 between American and the authority violates 49 U.S.C. § 1349(a), a statute enacted for the protection of the public, in so far as it grants American the exclusive right for the use of the landing area and the air navigation facility at the airport.").

D

Finally, we review DOT's ruling that the Wright Amendment permits an airline to offer through service from Love Field to points outside the Love Field service area as long as the airline uses a city within Texas as a connecting point and a 56-passenger aircraft to get to that point.[23] While DOT, Continental Express, and Legend

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[23] As an initial matter, we clarify the precise issue addressed in DOT's Declaratory Order. DOT purportedly

Airlines argue that we should uphold this ruling, every other party to this action – Dallas, Fort Worth, the DFW Board, Southwest Airlines, and American Airlines – contends that permitting an airline to offer through service between Love Field and "the world" violates both the plain meaning of and the congressional intent behind the Wright Amendment. Once again, since DOT is charged with administering the Wright Amendment, we review its ruling under the two-step *Chevron* analysis. *See Texas Oil & Gas Ass'n*, 161 F.3d at 937-38.

This issue arose from Continental Express's decision to offer and advertise through service between Love Field and "the world." Continental Express flies passengers from Love Field to Houston's Intercontinental Airport on an aircraft with a maximum capacity of 56 passengers and then transfers them to worldwide flights on large jets. Passengers taking advantage of this service receive one ticket and, though they must change planes, do not

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determined "[w]hether the Wright and Shelby Amendments allow an airline to offer through service from Love Field to points outside the seven-state area within which unrestricted service is permitted, if the airline uses a city *within the seven-state area* as a connecting point and uses aircraft with no more than 56 seats for its flights between Love Field and the connecting point." Declaratory Order at 18 (emphasis added); *see also* DOT Procedural Order at 3 (Sept. 3, 1998). The substance of DOT's ruling, however, is geared towards the specific service offered by Continental Express and therefore considered solely whether the Love Field amendments permit an airline to offer through service through a point *within Texas*. We limit the scope of our review to the narrower question actually resolved by DOT.

have to reclaim and recheck their luggage at the connecting point.

As discussed above, subsection (a)(2) of the Wright Amendment excludes from section (a)'s general prohibition against interstate transportation flights out of Love Field that are operated on an aircraft with a capacity of 56 passengers or less. Subsection (c) of the Amendment permits flights between Love Field and any point in Texas or one of the four contiguous states (later expanded to seven) on any size aircraft as long as "(1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State." § 29, 94 Stat. at 48.

DOT interpreted subsection (a)(2) as authorizing the service offered by Continental Express. More specifically, DOT reads the commuter airlines exemption to exempt planes with a passenger capacity of less than 57 from all restrictions in the Wright Amendment. Under this interpretation, the restrictions on service in subsection (c)-including the restrictions on through service-do not apply to aircrafts operating under the commuter airline exemption. In contrast, the Fort Worth Petitioners, Southwest Airlines, and the City of Dallas contend that DOT's interpretation violates the plain language of the Wright Amendment. Under their interpretation of the statute, the restrictions on service in subsection (c)(2) apply to both commuter flights under subsection (a)(2) and flights on large aircrafts.

These two plausible yet conflicting readings of the relevant provisions of the Wright Amendment, coupled with a lack of legislative history illuminating the proper interaction between subsections (a)(2) and (c)(2), convince us that Congress did not speak directly to the issue before us. Accordingly, we move to step two of *Chevron* and inquire whether DOT's interpretation is a reasonable one. Under *Chevron*, an agency's interpretation is "reasonable" if it is "not patently inconsistent with the statutory scheme." *See Continental*, 843 F.2d at 1452 (citations omitted). We need not agree with DOT's interpretation in order to uphold it as reasonable. *See Exxon Corp. v. Lujan*, 970 F.2d 757, 761 (10th Cir. 1992) ("The agency's interpretation need not be the only one it could have adopted, or the one that this court would have reached had the question initially arisen in a judicial proceeding.") (citation omitted).

We are persuaded that DOT's interpretation of the Wright Amendment is a permissible one within the meaning of *Chevron*. DOT grounds its ruling largely on the argument that by imposing an express restriction on through service on large jets operating under subsection (c)(2) but declining to impose a similar restriction on commuter planes operating under section (a)(2), Congress was evincing its intent to permit small aircrafts to fly without such a restriction.[24] We view this reading of

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[24] Each party opposing DOT's position argues that it conflicts with the agency's 1985 Order holding that Continental could not provide interlining service on a large jet through a connecting point in Texas. *See* Love Field Amendment Proceeding, DOT Order 85-12-81, 1985 WL 57886 (1985). In that interpretive proceeding, DOT addressed whether airlines could

the amendment as reasonable and not inconsistent with a statutory scheme aimed at preserving Love Field as a primarily shorthaul facility while still allowing some longhaul service. *See* H.R. Conf. Rep. 96-716, at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78, 86 (stating that the Wright Amendment "embodies a compromise which permits limited commercial passenger service in interstate transportation at Love Field.").

This is not to say that we find DOT's interpretation to be the only or the best reading of the Wright Amendment. In order to reach its decision, DOT necessarily defined "air transportation on 56-passenger capacity planes" as including air service provided *in part* by such aircrafts. Similarly, it implicitly defined intrastate service as including flights with only an intrastate portion. These interpretations strain the meaning of both terms. Furthermore, we note with concern the potential impact of DOT's ruling. While it seems unlikely that permitting interstate service outside of the Love Field service area on small planes would have any impact on DFW's role as the Dallas area's primary long-haul facility, it seems significantly more likely that following the DOT ruling, airlines

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provide interlining service exclusively on large planes. There, DOT essentially agreed with an earlier CAB ruling that an air carrier could not "evade the [Wright] Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area." 1985 WL 57886, at *11 (citation omitted). We agree with DOT that its previous interpretation can be distinguished on the grounds that DOT premised its earlier order on an interpretation of section (c)(2) of the Wright Amendment, whereas the agency's decision here relies primarily on an interpretation of section (a).

who already operate small aircrafts will commence interlining service connecting in Houston or another Texas airport. However, determinations of this nature are directly within DOT's expertise, not ours, and we will not substitute our judgment on aviation-related issues for their reasonable one. Accordingly, we affirm DOT's ruling as a reasonable interpretation of the Wright Amendment.

V

For the foregoing reasons, we DENY the petitions for review and AFFIRM DOT's orders.

APPENDIX B

Posted 12/22/98 **Order 98-12-27**

[LOGO] 6:00 P.M. **SERVED December 23, 1998**

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the **22nd day of December, 1998**

LOVE FIELD SERVICE INTERPRETATION PROCEEDING	:	Docket OST-98-4363

DECLARATORY ORDER

The Cities of Dallas and Fort Worth agreed in 1968 to create Dallas-Fort Worth International Airport ("DFW") as the metropolitan area's primary airport. The two cities agreed to phase out service at their local airports, which included Love Field, owned and operated by the City of Dallas, and cause the airlines serving the area to use DFW for all interstate flights. The cities' goal of prohibiting all interstate service at Love Field conflicted with Southwest Airlines' plans to use the airport for interstate service. Congress therefore enacted a federal statute authorizing a limited amount of interstate service at Love Field. Section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980) ("the Wright Amendment"). Last year Congress amended the Wright Amendment to authorize additional interstate service at Love Field. Section 337 of the Department of Transportation

and Related Agencies Appropriations Act, 1998, P.L. No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997) ("the Shelby Amendment").

In response to Congress' enactment of the Shelby Amendment, Fort Worth filed a suit in the Texas state courts seeking to compel Dallas to block any airline from operating the additional types of service authorized by that statute. Fort Worth's filing led to additional litigation in the state and federal courts, including a declaratory judgment suit filed by Dallas against this Department and Fort Worth. In general, Fort Worth, joined by American Airlines and the DFW Board, contend that, under the cities' 1968 agreement, Dallas may allow airlines to operate only those Love Field services permitted by the Wright Amendment. Dallas, Continental Express, Southwest Airlines, and Legend Airlines (a proposed new entrant that plans to operate longhaul service from Love Field with aircraft reconfigured to hold no more than 56 seats) contend that the federal law overrides the cities' agreement and that Dallas must allow airlines to operate the additional services authorized by the Shelby Amendment.

The litigation led most of the parties to ask the Department to intervene in some manner in the dispute. The Department began this proceeding to issue an interpretation of the meaning of the relevant federal statutes in light of the parties' requests and the importance of the issues. Order 98-8-29 (August 25, 1998). This Department, including the Federal Aviation Administration ("FAA"), is responsible for administering the relevant statutes. *See, e.g., Cramer v. Skinner,* 931 F.2d 1020, 1024 (5th Cir. 1991), *cert. denied,* 502 U.S. 907. The Department's issuance of an

order addressing issues involving Love Field is not without precedent. The Department held a similar proceeding in 1985 in order to resolve other disputes over the interpretation of the Wright Amendment. Order 98-8-29 at 1, 3, citing *Love Field Amendment Proceeding*, Order 85-12-81 (December 31, 1985). The Court of Appeals affirmed the Department's interpretation of the Wright Amendment. *Continental Air Lines v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988).

The Department has received comments and reply comments from all of the parties in the litigation, as well as several airport parties, the unions representing the pilots at American and Southwest, the Love Field Citizens Action Committee, and Delta Air Lines. In general, the parties in the litigation have taken the same position in their pleadings as they have in court. Fort Worth, American, and the DFW Board also urge the Department to dismiss this proceeding, while Dallas, Southwest, Continental Express, and Legend assert that the Department should issue a ruling on the federal law issues.

After considering all of the parties' arguments, the Department has concluded that it has the authority and responsibility to issue rulings on the federal law issues presented by the dispute over additional airline service at Love Field. The Department finds that the restrictions on Love Field service sought by Fort Worth, American Airlines, and the DFW Board are contrary to federal law and that the Wright and Shelby Amendments largely permit (i) unrestricted longhaul service with aircraft containing a passenger capacity of 56 passengers or less and (ii) flights with larger aircraft to cities in Kansas, Mississippi, and Alabama, as explained in this order. The Department is

simultaneously issuing a separate order that addresses the parties' various procedural motions in this proceeding.

The Department's decision that Dallas may not block airlines from operating services authorized by the Shelby Amendment reflects Congress' intent in enacting the Wright and Shelby Amendments and follows earlier decisions by the courts and federal agencies interpreting the relevant federal statutes.

This decision is also consistent with the FAA's recent preliminary determination in an administrative proceeding that a Colorado airport may not prevent an airline from operating scheduled service when the airport allowed comparable flight operations by other firms. *Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority,* FAA Docket Nos. 16-98-05 *et al.,* Director's Determination (issued August 21, 1998).

The Department is not holding that Dallas has no authority to limit the level of operations at Love Field. Airport operators may not regulate airline routes, as Fort Worth seeks to do, but airport owners have authority to regulate most aspects of airport operations. The Department's interpretation here does not place in question the legitimate management rights of airport owners. The Department is also basing its decision on current circumstances. No one has tried to show in this proceeding that the additional services authorized by the Shelby Amendment could jeopardize DFW's role as the area's principal airport.

FACTUAL AND LEGAL BACKGROUND

The Cities' Agreement to Build DFW and Phase-Out Service at the Local Airports

The restrictions on Love Field service initially grew out of the two cities' settlement of a long-standing dispute over the Dallas-Fort Worth area's airline operations. For many years Dallas and Fort Worth operated separate airports (Love Field was the Dallas airport) and fought over which airport should be the metropolitan area's principal airport. The two cities resolved the dispute in the 1960s by agreeing to build DFW to replace their local airports and to end virtually all airline service at Love Field and Fort Worth's local airports. The cities' agreement resulted in large part from the threat by the Civil Aeronautics Board ("the Board") that it might consolidate all of the area's service at one of the local airports if the cities did not settle their dispute. *See City of Dallas, Texas v. Southwest Airlines*, 371 F.Supp. 1015, 1019-1021 (N.D. Tex. 1973), *aff'd on different grounds*, 494 F.2d 773 (5th Cir. 1974).

Before the cities settled their dispute, Fort Worth's major airport was Greater Southwest International Airport, which was demolished as a result of DFW's construction. Fort Worth has another airport, Meacham Field, still useable by airlines. Love Field was the Dallas airport used by the scheduled airlines.

Each airline then serving Love Field under certificate authority granted by the Board agreed to operate all of its interstate service at DFW. *See City of Dallas, Texas, supra*, 371 F. Supp. at 1020-1021. Southwest, however, was operating intrastate flights under state authority and refused

to move. Its refusal led to years of litigation, as described below.

The Wright Amendment has allowed Southwest to provide interstate service from Love Field and points in the four states bordering Texas. Despite Southwest's continuing use of Love Field for interstate service, DFW became the area's primary airport, as the cities desired, and has grown from 11.3 million enplaned passengers in 1979 to 60.5 million enplaned passengers in 1997. Continental Express Reply at 2.

Dallas and Fort Worth currently own DFW, which is managed by the DFW Board. The DFW Board is a local governmental body created and authorized under state law to be the owner and operator of DFW.

The Terms of the Bond Ordinance

As part of their agreement, the two cities jointly passed a bond ordinance, the 1968 Regional Airport Concurrent Bond Ordinance ("the Bond Ordinance"). Whether the Bond Ordinance limits Love Field service, and whether Dallas may enforce any such limitations, lie at the heart of the parties' current dispute. Exhibit 8 to the DFW Board's comments is a copy of the Bond Ordinance. The key provision is section 9.5, which obligated each city to move scheduled interstate services to DFW as far as "legally permissible." Section 9.5A sets forth the cities' obligation to transfer interstate airline services to DFW:

> It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA, and Meacham Field, own and operate airports which

> by their nature are potentially competitive with the operation of the Regional Airport [DFW]. It is further acknowledged that and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.

This section gives the DFW Board some authority to waive this restriction:

> From time to time hereafter, the [DFW Board] may review the effect and application of such covenant, and by concurring action of not less than eight (8) of its members, the Board may reasonably limit its scope and effect and may waive its application in specific instances if it shall first determine that such action is necessary (1) in the interest of public safety; (2) in the interest of prudent and efficient operations at [DFW]; or (3) in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort

> Worth metropolitan region considered as a whole.

The DFW Board may not grant such a waiver if doing so would substantially reduce DFW's revenues as defined in the agreement.

Related obligations are contained in Section 9.5B of the Bond Ordinance, which reads in part as follows:

> In addition to the covenant of the Cities contained in [paragraph 9.5A], the Cities further agree that they will through every legal and reasonable means promote the optimum development of the lands and facilities comprising the Regional Airport at the earliest practicable date, thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the [DFW Board] will undertake with regard to the Regional Airport, Love Field, GSIA, Meacham Field or Redbird, any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and facilities at the earliest practicable date; and none of the airports of the Cities shall be put to or developed for any use which by the nature thereof the optimum use and development of the Regional Airport, including its air and land space, at the earliest practicable date will be impaired, diminished, reduced or destroyed.

The Bond Ordinance's definition of "Certificated Air Carrier Services" includes (i) scheduled interstate services operated under certificate authority granted by the Board or any successor agency, (ii) scheduled services operated

by foreign airlines under authority granted by the Board or any successor agency, and (iii) scheduled intrastate services operated under authority granted by the Texas Aeronautics Commission or any successor agency. The definition excludes services provided by "air taxis" under exemption authority granted by the Board or the Texas agency. Section 2.1G.

The Bond Ordinance by its terms does not prohibit all interstate service at Love Field. It conditions the cities' obligation to transfer services to DFW by requiring them to take that action "as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action)." As explained below, in the first round of litigation over Southwest's use of Love Field, the district court read the Bond Ordinance as requiring the phase-out of interstate service only insofar as permitted by law. *City of Dallas, supra,* 371 F. Supp. at 1019, 1035.

Southwest's Efforts to Use Love Field

After DFW opened, Dallas kept Love Field open for limited uses. When Southwest refused to move to DFW, Dallas, Fort Worth, and several competing airlines repeatedly tried to compel Southwest to stop using Love Field, primarily through litigation.

Dallas and others filed a suit in federal district court to force Southwest to move out of Love Field to DFW. In that case the district court held on several grounds that Dallas could not block Southwest from using Love Field. *City of Dallas, Texas v. Southwest Airlines, supra,* 371 F. Supp. at 1015. Among other things, the city's efforts to

stop Southwest's service violated its obligation under federal law not to discriminate among airport users. 371 F. Supp. at 1028-1030. While the Bond Ordinance prohibited intrastate flights by airlines like Southwest operating under state authority, it allowed airlines operating under federal certificate authority to operate intrastate flights and allowed non-certificated commuter airlines to operate at Love Field. 371 F. Supp. at 1027-1028, 1031. The court additionally held that Dallas could not block Southwest from using Love Field when the Texas Aeronautics Commission had specifically authorized Southwest to operate intrastate flights from Love Field. 371 F. Supp. at 1032-1034. The court concluded that it did not need to invalidate the Bond Ordinance provision requiring the phase-out of most scheduled service at Love Field, since that provision specifically obligated Dallas to take such action only to the extent that it was legally permissible. Dallas could not legally force Southwest to move to DFW. 371 F. Supp. at 1034-1035.

On appeal the Fifth Circuit affirmed the district court's holding that Dallas could not block Southwest from using Love Field when the Texas agency had specifically authorized Southwest to use that airport. *City of Dallas, Texas v. Southwest Airlines, supra,* 494 F.2d 773. The Fifth Circuit did not address the other grounds relied upon by the district court.

A second round of litigation resulted from Dallas' adoption of an ordinance imposing a $200 fine for each takeoff and landing by a commercial airline at Love Field. The district court enjoined Dallas from enforcing this ordinance. *See Southwest Airlines v. Texas International Airlines,* 396 F. Supp. 678, 680, 682 (N.D. Tex. 1975).

Several airlines that used DFW and competed with Southwest created a third round of litigation. After the Fifth Circuit held that Southwest was entitled to use Love Field, these airlines asked a state court to end Southwest's use of the airport. Their action caused the district court to enter an injunction barring any litigation that sought to overturn the court's decision that Southwest had the right to operate at Love Field. *Southwest Airlines v. Texas International Airlines*, 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir. 1977).

The district court later entered a permanent injunction, which, as described below, is the basis of Southwest's motion asking the court to enforce the injunction against Fort Worth (Exhibit 7 in Dallas' comments is a copy of the injunction). Southwest claimed that Fort Worth violated the injunction by suing Dallas and asking the state court to grant relief that would limit Southwest's Love Field flights.

The Enactment of the Wright Amendment

When the two cities built DFW, airline routes, rates, and services were extensively regulated by the Board. Southwest avoided Board regulation by operating as an intrastate airline. After Congress deregulated the airline industry in 1978, Southwest wished to begin interstate service. It applied for federal authority to serve the Love Field-New Orleans route under the so-called "automatic entry" provision in the deregulation act. Dallas, Fort Worth, and others opposed Southwest's application. The Board granted the application since it had no power to

deny it. *Southwest Airlines Automatic Market Entry*, 83 CAB 644 (1979).

This Board decision led to Congress' enactment of the Wright Amendment limiting interstate passenger service at Love Field. Section 29 of the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980) (the amendment has never been codified).

Congressman Jim Wright of Fort Worth offered an amendment to a bill deregulating international air transportation. His amendment, adopted by the House, would have prohibited all interstate service at Love Field (other than commuter airline operations), as demanded by Dallas and Fort Worth. *See* H.R. Rep. No. 96-716, 96th Cong., 1st Sess. (1979), at 24; exhibit 19 to the DFW Board's comments is a copy of the conference committee report. The Senate, however, refused to ban interstate service at Love Field. The conference committee created the Wright Amendment, which allowed a limited amount of interstate service at Love Field. *See* H.R. Rep. No. 96-716 at 24-26.

The Wright Amendment reads as follows:

> (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more

points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

The amendment thus prohibited interstate scheduled passenger service at Love Field, subject to four exceptions. The three exceptions created by subsections (a) and (b) allowed (i) unrestricted service using aircraft seating no more than 56 passengers (we will refer to this exception as the "commuter aircraft exemption"), (ii) ten charter flights per month, and (iii) the interstate services that existed on November 1, 1979. Subsection (c) additionally allowed airlines to operate Love Field flights to or from points in Texas, New Mexico, Oklahoma, Arkansas, and Louisiana ("the Love Field service area") but barred the sale of through transportation between the endpoint of such a Love Field flight and any point outside the Love Field service area. Thus, if a traveller wished to fly from Love Field to a point outside the Love Field service area, the traveller could transfer at the endpoint of a Love Field flight to another flight going to the point outside the Love Field service area, but the traveller had to buy a separate ticket for each flight and could not check his or her luggage through from Love Field to the final destination. See *Cramer v. Skinner*, 931 F.2d 1020, 1023 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 298.[1]

The conference committee report stated that this amendment "provides a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years" and that the settlement "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW airport authority,

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[1] The courts upheld the Constitutionality of the restrictions on Love Field service in *Cramer* and in *State of Kansas v. United States*, 16 F.3d 436 (D.C. Cir. 1994).

and related constituent groups." H.R. Rep. No. 96-716 at 24. The report further stated, "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively, apply to the authority to serve Love Field on interstate flights authorized by the amendment." H.R. Rep. No. 96-716 at 26.

As noted, the Bond Ordinance had prohibited all scheduled interstate service from Love Field except air taxi service, to the extent legally permissible. The Wright Amendment, on the other hand, allowed airlines to operate some interstate service. Dallas and Fort Worth, however, never amended the Bond Ordinance to reflect these changes. Thus the Bond Ordinance by its terms, as construed by Fort Worth, prohibits interstate services which may be operated (and which Southwest has been operating) under the Wright Amendment. *See* Dallas Reply at 12. In addition, another airline – Muse – operated a significant amount of interstate service at Love Field under the Wright Amendment. *Analysis of the Impact of Changes to the Wright Amendment*, Interdepartmental Task Force on the Wright Amendment (July 1992), at 9.

Southwest has used the Wright Amendment's authorization for unrestricted short-haul service to greatly expand its interstate service at Love Field consistently with the statutory restrictions.

The Department's Earlier Order Interpreting the Wright Amendment

In 1985 the Department issued an order interpreting the Wright Amendment due to an earlier controversy over

Love Field service. Continental then proposed to begin operating flights between Love Field and Houston with large aircraft (not aircraft with a passenger capacity of 56 passengers or less). DFW, Dallas, Fort. Worth, and Southwest opposed Continental's plans, primarily because the Wright Amendment allegedly barred Continental from serving Love Field since it interlined with other airlines elsewhere in its system. Several of these parties asked us to block Continental's proposed service. *See* Order 85-7-65 (July 26, 1985).

This dispute led the Department to issue an order interpreting the statutory restrictions. Order 85-12-81 (December 31, 1985), *aff'd, Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). The Department held that an airline that interlined elsewhere on its system could operate interstate flights from Love Field as long as it did not provide interline or through service from Love Field to points outside the Love Field service area, that any airline could operate Love Field flights under the commuter aircraft exemption as long as it used aircraft with a passenger capacity of 56 passengers or less, and that no airline could advertise the availability of service from Love Field to points beyond the Love Field service area.

Despite the Department's decision, Dallas refused to lease any facilities to Continental for its Houston flights. Continental then filed a state court suit against Dallas, which argued that Continental's proposed service would violate the Bond Ordinance and Continental's use agreement with DFW, which required compliance with the Bond Ordinance. Fort Worth and the DFW Board supported Dallas. The Texas Court of Appeals held that

Continental's agreement with DFW allowed it to operate the Love Field-Houston service, since the service would be intrastate and therefore permitted by the agreement. *City of Dallas v. Continental Airlines*, 735 S.W. 2d 496 (Tex. Ct. App. 1987). The court agreed with the Department's conclusion that Continental's proposed service would be intrastate service. Continental, however, never began operating the Houston-Love Field service.

The Department's Love Field Study

In the early 1990s members of Congress from Kansas and other states outside the Love Field service area sought a repeal or loosening of the Wright Amendment. The Texas Congressional delegation opposed their efforts. As a result of this Congressional debate, the Department prepared a report on the likely effects of changing the restrictions on Love Field service. *Analysis of the Impact of Changes to the Wright Amendment*, Interdepartmental Task Force on the Wright Amendment (July 1992) ("*Love Field Study*"). The study analyzed the impact of two possible changes: (i) a repeal of the Wright Amendment and (ii) a modification allowing nonstop flights of up to 650 miles and through service to any beyond destination.

The study concluded that expanding Love Field service would greatly benefit the Dallas-Fort Worth metropolitan area, *Love Field Study*, Executive Summary at 1; that allowing additional service at Love Field "will have little if any impact on Dallas-Fort Worth Airport's growth" and that "[t]he overall impact on Dallas-Fort Worth Airport from a diversion of service to Love Field (or any change in the Wright Amendment under the existing scenarios) is

negligible . . . ," *id.* at 10, 31; and that "[u]nder all possible scenarios, Dallas-Fort Worth Airport will continue to grow and remain the area's dominant airport," *Love Field Study*, Executive Summary at 1.

The Department submitted the report to Congress but made no recommendation on whether the Wright Amendment should be repealed or modified. Congress took no action.

Proposals to Use Reconfigured Aircraft.

In 1996 Dalfort Aviation, Legend's parent, developed a plan to use reconfigured large aircraft (B-737's, B-727's, or DC-9's) to operate longhaul service at Love Field under the commuter aircraft exemption. Dalfort planned to remove all but 56 seats from its large aircraft and then operate flights from Love Field to points outside the Love Field service area. Dalfort argued that its proposed operations would be lawful under the commuter aircraft exemption. Dalfort requested a legal opinion from the Department on whether its proposed operations were permitted by the Wright Amendment.

On September 19, 1996, the Department's General Counsel, Nancy E. McFadden, issued an opinion that held that the commuter aircraft exemption applied only to aircraft originally designed to hold no more than 56 seats. Since Dalfort intended to use larger aircraft reconfigured to come within the 56-passenger capacity limit, Dalfort's proposal would be unlawful.[2]

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[2] The General Counsel's conclusion was consistent with a May 16, 1994, ruling by Rosalind A. Knapp, the Department's

Dalfort sought judicial review of the opinion. *Astraea Aviation, d/b/a Dalfort Aviation v. U.S. Department of Transportation*, 5th Cir. No. 96-60802 (filed November 18, 1996). The Shelby Amendment made the case moot before it was decided. As noted below, the parties' stipulation to dismiss the case stated that Legend could operate longhaul flights permitted by the Shelby Amendment; exhibit 12 to Dallas' comments is a copy of the stipulation.

The Shelby Amendment.

Congress addressed the General Counsel's opinion by enacting the Shelby Amendment, section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L.No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997). The amendment originated in the Senate Appropriations Committee, whose Chairman is Senator Richard Shelby.

As revised by the conference committee, the Shelby Amendment authorized increased Love Field service in two ways. First, it modified the commuter aircraft exemption so that it expressly exempts service operated by any aircraft reconfigured to hold no more than 56 seats, unless the aircraft's gross aircraft weight exceeded 300,000 pounds. Secondly, the amendment added three states – Kansas, Mississippi, and Alabama – to the Love Field service area (the states within which unrestricted

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Deputy General Counsel, on a similar proposal made by Centennial Express. Centennial Express planned to use reconfigured large aircraft to operate service between Denver's Centennial Airport and Love Field.

service with large aircraft may be operated from Love Field).

The Shelby Amendment reads as follows:

> (a) IN GENERAL – For purposes of the exception set forth in section 29(a)(2) the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION – The first sentence of section 29(c) of [the Wright Amendment] is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".
>
> (c) SAFETY ASSURANCE – The Administrator of the Federal Aviation Administration shall monitor the safety of flight operations in the Dallas-Fort Worth metropolitan area and take such actions as may be necessary to ensure safe aviation operations. If the Administrator must restrict aviation operations in the Dallas-Fort Worth area to ensure safety, the Administrator shall notify the House and Senate Committees on Appropriations as soon as possible that an unsafe airspace management situation existed requiring the restrictions.

The Shelby Amendment has already resulted in new service at Love Field, for Southwest is offering through

service from Love Field to Jackson, Mississippi, and Birmingham, Alabama. The Wright Amendment had prohibited such service. Southwest alleges that these new services have enabled travellers to obtain much lower fares – the lowest unrestricted one-way fares in the Dallas-Jackson and Dallas-Birmingham markets fell from $324 and $480, respectively, to $149 and $189, respectively, when Southwest began through service. Southwest Comments at 16.

In addition, Legend, a start-up airline, and Continental Express have planned to begin new interstate service. Legend wishes to operate longhaul service from Love Field with large aircraft reconfigured to hold no more than 56 seats. Continental Express planned to operate Love Field-Cleveland flights with regional jets having no more than 56 seats, but the state court has temporarily enjoined that service (as explained below, the Wright Amendment would have allowed Continental Express to operate these Cleveland flights).

Both Continental Express and American have begun operating intrastate flights at Love Field – Continental Express to Houston, a hub for its affiliate, Continental Airlines, and American to Austin. American operates fourteen daily roundtrip flights to Austin. Continental Express Comments at 1; Legend Comments at 46-47. The DFW use agreements and the Bond Ordinance do not prohibit intrastate service at Love Field and thus allow these American and Continental Express flights.

Other Statutes

Other federal statutes applicable to all airports also govern Dallas' operation of Love Field. A key statutory section, 49 U.S.C. 41713(b), preempts state and local government regulation of airline routes, fares, and services. *See, e.g., American Airlines v. Wolens*, 513 U.S. 219 (1995). However, this section contains an exception allowing a local government that owns an airport to exercise its proprietary powers as the airport's owner. 49 U.S.C. 41713(b)(3). Congress enacted this provision as section 4 of the Airline Deregulation Act of 1978, P.L. No. 95-504, 92 Stat. 1705 (1978).

As discussed below, the applicability here of the preemption provision with its exception allowing airport owners to exercise their proprietary powers is a key issue in the Love Field dispute. Fort Worth and the parties agreeing with Fort Worth claim that the restrictions sought by them may be implemented by Dallas in its capacity as Love Field's owner; Dallas and the parties opposing Fort Worth contend that Dallas may not impose such restrictions.

Dallas has also obligated itself to comply with the grant assurances required when airports accept FAA Airport Improvement Program grant funds, for Dallas has obtained federal grants for Love Field. Dallas Comments at 2, 15. Those assurances, imposed under 49 U.S.C. 47107, require among other things that the airport be available for public use on reasonable terms and conditions and bar the airport from unjustly discriminating against any user. 49 U.S.C. 47107(a)(1).

The Current Litigation

State Court Litigation. The Shelby Amendment is at the core of the current litigation over Love Field service. Before the President signed the appropriations bill containing the Shelby Amendment, Fort Worth filed a state court suit against Dallas, Legend, and others to block additional service at Love Field. *City of Fort Worth, Texas v. City of Dallas, Texas, et al.*, Tarrant County District Ct. No. 48-171109-97 (filed October 10, 1997). American Airlines and the DFW Board supported Fort Worth's position in this case.

On July 9, 1998, the state court enjoined Continental Express from operating Love Field-Cleveland flights pending the court's final decision. The DFW Board argued that Continental Express' Cleveland flights should be enjoined since Continental Express' parent corporation, Continental, had signed a use agreement that barred it from operating interstate service at Love Field.

On October 15 the state court granted the summary judgment motions filed by Fort Worth, American, and the DFW Board against Dallas, Continental Express, and Legend. The court found that Dallas was obligated by the Bond Ordinance (as amended by the Wright Amendment) to bar airlines from operating services authorized by the Shelby Amendment and that federal law did not override the cities' agreement restricting Love Field service. *See* Fort Worth Report on Status of "Fort Worth Action." The court did not issue an opinion explaining the basis for this decision.

Continental Express initially appealed the grant of the temporary injunction but withdrew the appeal after the

trial court's summary judgment decision. Continental Express and Legend have publicly stated that they will appeal that decision.

Federal Court Litigation. After Fort Worth sued Dallas in state court, Dallas filed a federal court suit against this Department and Fort Worth to obtain a declaratory judgment that Dallas may not bar airlines from operating service authorized by the Shelby Amendment. *City of Dallas, Texas v. Department of Transportation et al.*, N.D. Tex. No. 3-97CV-2734-T (filed November 6, 1997). To protect plans to begin flights from Love Field to Houston and Cleveland, Continental Airlines and Continental Express filed their own suit, *Continental Airlines and Continental Express v. City of Dallas and City of Fort Worth*, N.D. Tex. No. 398CV1187-R (filed May 19, 1998). The federal court has consolidated these suits. It had set January 1999 as the deadline for filing summary judgment motions but recently vacated that schedule.

The earlier federal court litigation between Southwest, the two cities, and other parties over Southwest's right to use Love Field had resulted in the issuance of an injunction barring efforts to interfere with the court's decision that Southwest was entitled to continue using Love Field. *Southwest Airlines and Texas Aeronautical Comm'n v. Texas International Airlines et al.*, Order Granting Permanent Injunction (February 23, 1982), N.D. Tex. No. CA 3-75-0340-C. On March 27, 1998, Southwest moved to reopen that proceeding to ensure its ability to operate additional service from Love Field. The district court denied Southwest's request for an order enforcing its

rights after Fort Worth represented that it had no intention of interferring with Southwest's operations. *See* Southwest Comments at 17-18.

Related Administrative Proceedings

Administrative Complaint. On November 17, Legend filed a complaint with the FAA against Fort Worth, the DFW Board, and American that charges them with violating federal law. Legend asked the FAA to terminate all aviation grants for Fort Worth.

The FAA dismissed the complaint on December 7. The FAA concluded that Legend's request to enforce the grant restrictions applicable to Love Field was misdirected, since Legend filed the complaint against Fort Worth and the DFW Board, not Dallas. In addition, the FAA stated that it would not investigate complaints about a violation of the statutory preemption provision, 49 U.S.C. 41713, unless the complaint alleged conduct that would also be an unreasonable or unjustly discriminatory restriction on aircraft access by an airport operator under its Airport Improvement Program grant assurances.

Legend's Certificate Application. Legend has filed an application for certificate authority under 49 U.S.C. 41102 so that it may begin airline operations. Docket OST-98-3667. Fort Worth is opposing Legend's application in part by arguing that Legend's proposed service – longhaul flights from Love Field operated with reconfigured large aircraft – would violate the Wright Amendment. Fort Worth Answer at 13-17, Docket OST-98-3667. Fort Worth urged the Department to delay ruling on Legend's application until the state court had decided

whether Legend's proposed service would be lawful. *Id.* at 21-22. American filed an answer concurring with Fort Worth's position.

The Department has issued a show-cause order tentatively finding that Legend meets the statutory requirements for obtaining certificate authority. Order 98-10-15 (October 16, 1998). The Department stated that it would consider in this proceeding the arguments about Legend's ability to carry out its service proposal, if the Department did not grant Fort Worth's motion to dismiss. *Id.* at 4-5.

Amendment of U.S. Airlines' Certificate Authority. The Department included in every U.S. airline's domestic certificate a condition barring that airline from operating Love Field service, except as permitted by the Wright Amendment. The Department recently amended that condition to reflect the changes made by the Shelby Amendment. Order 98-7-6 (July 8, 1998). As explained there, the certificate amendments were a ministerial action that did not require a decision on other issues, such as those raised in the pending lawsuits. *Id.* at 6.

FAA Enforcement Proceeding. The FAA has begun an enforcement proceeding against an airport that imposed operating restrictions analogous to the ones that Fort Worth wishes to impose on Love Field. The FAA has issued a Director's Determination, a preliminary decision, holding that the Arapahoe County Public Airport Authority, the owner of Centennial Airport, an airport located near Denver, violated its obligations under federal law by denying access to Centennial Express Airlines, a scheduled airline, when the airport allows charter

airlines operating similar equipment to use the airport. *Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority*, FAA Docket Nos. 16-98-05 *et al.*, Director's Determination (issued August 21, 1998) ("Centennial Decision") (exhibit 17 in the DFW Board's comments is a copy of this FAA decision). The FAA held, among other things, that the airport's desire to have scheduled airlines use Denver International Airport was not a legitimate reason for blocking Centennial Express from using Centennial Airport. Centennial Decision at 24, 25. After the Director's Determination was issued, an FAA hearing officer held a hearing in the case as provided by 14 C.F.R. Part 16.

THE DEPARTMENT'S INSTITUTION OF THIS PROCEEDING

The dispute over new service at Love Field led to the institution of this proceeding. Several of the parties in the Texas litigation asked the Department to take steps to help resolve the dispute. Fort Worth asked the Department to mediate the dispute. Dallas and Legend urged the Department to intervene in the state court proceeding, although they suggested that the Department should issue a declaratory ruling if it was unwilling to intervene in the state court proceeding. American, on the other hand, asked the Department to let the Texas courts resolve the dispute.

The Department also received letters from Senator Trent Lott, the Majority Leader of the United States Senate, and Congressman Bud Shuster, the Chairman of the Committee on Transportation and Infrastructure of the United

States House of Representatives, asking the Department to take action to assert the federal interests involved in the dispute. After the Department began this proceeding, it received letters supporting Fort Worth's position from Senator Kay Bailey Hutchison and Congresswoman Kay Granger.

As the agency primarily responsible for the administration of the relevant statutory provisions, the Department decided to issue a ruling on the federal law questions that are the principal issues underlying the litigation. The Department had taken similar action in 1985 to resolve an earlier dispute over the interpretation of the Wright Amendment. *Love Field Amendment Proceeding*, Order 85-12-81 (December 31, 1985). The Department therefore asked the parties for their views on the federal law issues at issue in the dispute. Order 98-8-29 (August 25, 1998). The Department stated that it would rule on the following federal law issues raised by the Love Field dispute; one issue was added by Order 98-9-5 (September 3, 1998):

> (1) Whether the statutory preemption provision, 49 U.S.C. 41713(b), prohibits one airport owner by contract with a second airport owner from maintaining a commitment by the latter to limit airport operations at its own airport, and whether such a restriction falls within the proprietary powers exception in 49 U.S.C. 41713(b)(3);
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> (2) Whether the Wright and Shelby Amendments preempt the City of Dallas' ability to restrict service at Love Field except as consistent with the terms of those amendments;
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> (3) Whether the Shelby Amendment authorizes carriers using jet aircraft with a passenger

capacity of 56 seats or less to engage in longhaul service from Love Field to any city in the United States;

(4) Whether a major carrier may bind itself through its use agreements with the DFW Airport Board that it will not exercise the authority granted by its certificate to operate flights from Love Field that are consistent with the Wright and Shelby Amendments; and

(5) Whether the Wright and Shelby Amendments allow an airline to offer through service from Love Field to points outside the seven-state area within which unrestricted service is permitted, if the airline uses a city within the seven-state area as a connecting point and uses aircraft with no more than 56 seats for its flights between Love Field and the connecting point.

The Department stated that it intended to issue a ruling so that the courts could consider its interpretation. Order 98-8-29 at 5.[3]

THE PARTIES' COMMENTS

Parties Opposing Expanded Service

In their pleadings Fort Worth, American, and the DFW Board (collectively "the Fort Worth parties") argue that federal law allows Dallas as Love Field's proprietor to restrict service at that airport and that the Wright and Shelby Amendments do not preempt Dallas' ability to limit the scope of Love Field service, since the two

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[3] We later granted in part the requests by Fort Worth, American, and the DFW Board for more time for filing comments. Order 98-9-5 at 4.

amendments were intended only to limit the Department's authority to authorize service, not the cities' authority to restrict service authorized by the two statutes. These parties assert that Dallas is therefore obligated by the Bond Ordinance to bar airlines from operating the services authorized by the Shelby Amendment. Fort Worth and the DFW Board contend that the exception for aircraft with a passenger capacity of 56 passengers or less does not allow the operation of long-haul service with regional jets or reconfigured large aircraft and that the DFW Board may enforce its use agreement to bar an airline from operating interstate service at Love Field.[4] While American believes that the Bond Ordinance is enforceable against Dallas, American contends that a decision by the Department to the contrary would compel the Department to hold that the DFW Board may not block airlines from operating interstate service from Love Field.

Fort Worth, American, and the DFW Board additionally have made various procedural requests, such as their

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[4] The DFW Board submitted hundreds of pages of the transcript from the state court's proceedings but specifically cited none of the testimony in support of its case. The DFW Board should have cited any specific testimony that it wished the Department to consider. The courts have held in similar cases that a party must identify the material supporting its case when it files lengthy evidentiary pleadings in an administrative proceeding. *Northside Sanitary Landfill, Inc., v. Thomas*, 849 F.2d 1516, 1519-1520 (D.C. Cir. 1997); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997).

request for a dismissal of this proceeding. The Department is addressing these procedural issues in its companion order.

The Love Field Citizens Action Committee asserts that no decision may be issued without the preparation of an environmental impact analysis.

The Allied Pilots Association, which represents American's pilots, contends that we must consider safety issues before allowing more service at Love Field.

Parties Supporting Expanded Service

Dallas, Southwest, Continental Express, and Legend (collectively "the Dallas parties") contend that the Department may and should issue a decision on the federal law issues. These parties assert that Dallas may not bar airlines from operating the Love Field services authorized by the Wright and Shelby Amendments.

Dallas states that it is committed to maintaining DFW as the area's primary airport but that it needs a clear and final decision on its ability, if any, to restrict Love Field service. Dallas agrees with the DFW Board that it may enforce the provision in the DFW use agreements requiring airlines to comply with the Bond Ordinance's restrictions on using other airports in the Dallas-Fort Worth area.

Continental Express argues that it may operate longhaul service with aircraft with a passenger capacity of 56 passengers or less and that the DFW Board may not enforce the use agreements' prohibition against operating interstate service at other area airports.

Southwest takes no position on the scope of the exception for aircraft with a passenger capacity of 56 passengers or less, except that Southwest contends that an airline may not offer through service to points outside the Love Field service area, whether its Love Field flights use aircraft with a passenger capacity of 56 passengers or less. Southwest also thinks that the DFW Board may enforce an airline's commitment not to use another airport for interstate service.

The Southwest Airlines Pilots Association argues that expanded service at Love Field will create no safety problems.

Legend asks the Department to act quickly, since the ongoing litigation over the Shelby Amendment is injuring Legend's ability to compete with American and other airlines in Dallas-Fort Worth area markets. Legend agrees with Continental Express that the Shelby Amendment authorizes longhaul service with jet aircraft that meet the 56-passenger capacity requirement. Legend takes no position on whether the DFW use agreement is enforceable.

Other Parties

Two airport trade associations, the Airports Council International-North America and the American Association of Airport Executives ("the airport trade associations"), are concerned about preserving the ability of airport proprietors to reasonably allocate services between different airports and ask the Department to follow a case-by-case approach in determining whether

such an allocation is lawful. The airport trade associations also contend that airlines may waive rights by contract.

The City and County of San Francisco supports the airport trade associations' position.

The Greater Orlando Aviation Authority asserts that airlines may waive their rights by contract; if the Department disagrees, it should not make that ruling retroactive.

Delta asks that the decision be limited to the specific facts of Love Field and avoid any broader rulings, since the resolution of preemption questions depends greatly on the factual circumstances.

INTRODUCTION TO OUR DECISION

Summary of Decision

As explained in the companion order, the Department has determined, given its responsibility to administer the federal statutes relevant to the Love Field dispute, that it should publish a decision interpreting the relevant federal statutes. The Department is therefore denying Fort Worth's request to dismiss this proceeding, as discussed in the companion order ruling on the procedural issues raised in this proceeding.

In the light of the federal preemption of the regulation of airline routes by state and local governments, Dallas' proprietary powers as Love Field's owner do not allow it to impose the type of restrictions on Love Field service sought by Fort Worth, the DFW Board, and American. While an airport owner may impose limits on certain

types of service operated at an airport, those limits must be reasonable, non-discriminatory, and necessary to carry out a legitimate goal, such as limiting noise or congestion. The Fort Worth parties have not shown that the restrictions they seek would meet this standard.

In addition, the Wright and Shelby Amendments preempt any agreement between the cities restricting service at Love Field. Congress intended to allow airlines to operate the interstate services authorized by those statutes, despite the cities' wish to eliminate interstate service at Love Field. Congress made that decision under its authority to regulate interstate commerce, which authorizes it to regulate airline and airport operations.

Both the Wright and Shelby Amendments allow any airline to operate longhaul service with aircraft meeting the maximum 56-seat capacity standard, whether the airline may be deemed a commuter airline and whether the aircraft is a jet.

The DFW use agreements cannot block an airline from offering interstate service at Love Field. Like Fort Worth and Dallas, DFW has no authority to restrict an airline's use of Love Field. The Department disagrees with the DFW Board's contention that its agreements constitute an enforceable waiver by the airlines of any rights to use Love Field – insofar as the use agreements bar an airline from operating at an airport competing with DFW, the agreements are unenforceable.

Finally, the Department finds that Continental Express may offer through service to points outside the Love Field service area over Houston, if its flights from Love

Field to Houston use aircraft with a passenger capacity of 56 passengers or less.

The Department's conclusion that Dallas may not currently restrict service at Love Field to protect DFW from competition is fully consistent with the FAA's findings in its Centennial Decision. The Department has based this decision, however, on the facts of the Love Field dispute, for proprietary rights issues must be resolved case-by-case. The Department disagrees with the state court's decision on these issues, but the lack of any opinion explaining that court's analysis has prevented the Department from taking the court's rationale into account.

Before addressing the federal law issues set forth in the orders instituting this proceeding, the Department will discuss the safety and environmental issues raised by two parties.

SAFETY AND ENVIRONMENTAL ISSUES

The Safety of Dallas-Fort Worth Area Airline Operations

The Allied Pilots Association, the bargaining representative for American's pilots, suggests that we should defer deciding this proceeding until we have analyzed air traffic procedures for the Dallas-Fort Worth area and determined whether they should be changed. The Allied Pilots Association alleges that additional flights at Love Field will affect the risk analysis previously undertaken by the FAA.

The Southwest Pilots Association, on the other hand, contends that Love Field is one of the nation's safest airports and that allowing additional service at Love

Field will not reduce the safety of airline operations in the Dallas-Fort Worth area. They state, "We do not believe any legitimate safety issues exist, however, with respect to current or reasonably foreseeable levels of operations at Love Field or DFW."

The Department's decision interpreting the federal statutes governing Love Field and preemption will not affect safety. The FAA will maintain the safety of aircraft operations in the Dallas-Fort Worth area. As the *Love Field Study* stated, "The FAA will not permit air traffic safety to be compromised under any circumstances. Safety is ensured by FAA procedures and requirements based on air traffic control and system capacity. . . . " *Love Field Study* at 66. *See also Love Field Study*, Executive Summary at 1. Patrick V. Murphy, the Deputy Assistant Secretary for Aviation and International Affairs, similarly testified on October 21, 1997, before the Subcommittee on Transportation of the Senate Appropriations Committee, that increased Love Field service would not threaten safety, for "we concluded that safety would be maintained by FAA imposed air traffic procedures." The safety of airline operations in the Dallas-Fort Worth area is primarily affected by the total number of operations in the area, not by the number of flights using a particular airport.[5]

Moreover, the Shelby Amendment directs the FAA to monitor safety, and the conference committee report on

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[5] Under the position taken by Fort Worth and its allies, Southwest and other airlines may already add flights at Love Field within the limits set by the Wright Amendment. In fact American has begun operating fourteen daily roundtrip flights between Love Field and Austin.

the bill directed the FAA to review and report on air traffic procedures if operations at either DFW or Love Field increase by twenty-five percent or more. H.R. Rep. No. 105-313, 105th Cong., 1st Sess. (1997) at 45. Congress thus decided to authorize additional services at Love Field without first requiring a study of the possible impact on safety.

National Environmental Policy Act Issues

In its comments the Love Field Citizens Action Committee, which represents Love Field area residents dissatisfied with the noise and other environmental problems allegedly created by that airport, asserts that we may not issue a ruling in this proceeding without first preparing an environmental impact statement under the National Environmental Policy Act.

The Department finds that no environmental impact statement is necessary in this proceeding. The Department is interpreting existing statutory requirements. It is not taking discretionary action on its own that would affect the level of operations at Love Field. Congress has enacted legislation specifying what services may and may not be operated at the airport. As a result, there would be no point in preparing an environmental impact statement, as the Department explained when it amended the certificate authority of U.S. airlines to reflect the changes made by the Shelby Amendment. Order 98-7-6 (July 8, 1998) at 6-7. The courts have held that non-discretionary acts are exempt from the requirement to prepare an environmental impact statement, for the primary purpose of a statement is to assist agency decisionmaking. *See, e.g.,*

Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508 (4th Cir. 1992); *Atlanta Coalition on Transportation Crisis v. Atlanta Regional Comm'n*, 599 F.2d 1333 (5th Cir. 1979).

In addition, the *Love Field Study* contained a detailed analysis of the likely environmental impact of additional Love Field service. The *Love Field Study* concluded that any environmental effects would be outweighed by the public's ability to obtain more service and lower fares if airlines had a greater ability to serve Love Field. *See* Order 98-10-15 at 5, n. 12.[6]

INTRODUCTION TO THE FEDERAL STATUTORY ISSUES

The Department will now address the five legal issues on which it stated that it would issue an interpretation. As a preliminary matter, however, the Department wishes to emphasize the limited nature of its decision. Insofar as the airport proprietary rights issue is concerned, we are determining whether an airport has the power to restrict airline services in a way which is essentially the same as route regulation when there is no showing that the restrictions are needed to carry out a permissible airport

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[6] The Love Field Citizens Action Committee filed a report showing that severe traffic congestion would result if Love Field airline and general aviation operations increase from the current level of 225,000 per year to 400,000 per year. Love Field Citizens Action Committee October 9, 1998 pleading. As Legend points out, the report assumes that, if general aviation operations do not increase, Love Field airline operations will almost triple, which is highly unlikely. Legend Response to Love Field Citizens Action Committee Comments.

goal.[7] The limited scope of this decision is thus consistent with the requests by the airport trade associations, San Francisco, and Delta that the Department bear in mind that preemption and proprietary right questions are usually fact-specific and that it should avoid issuing an unnecessarily broad decision that could interfere with the legitimate needs of airports and airport operating practices.

This decision reflects their concerns. The Department recognizes that airport operators have legitimate management needs that are not preempted by federal law. The Department does not intend to undermine their ability to exercise those rights. Here the Department is concerned only with the question of whether Dallas has the authority as Love Field's owner to essentially regulate airline routes. The Department is basing its interpretation of the federal statutes on the specific circumstances of Love Field. While this interpretation of the statutory preemption and proprietary powers provisions in some respects may have wider applicability, the Department is largely

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[7] The Department is also not considering whether the Love Field restrictions sought by Fort Worth would violate the grant assurances given the FAA by Dallas in order to obtain federal grants for Love Field. The order instituting this proceeding did not ask the parties to address that issue. The prohibition against discrimination would be violated, however, if Southwest were allowed to provide services that other airlines could not. *City of Dallas, Texas v. Southwest Airlines, supra*, 371 F. Supp. at 1028-1030. In addition, the reasoning in the FAA's Centennial Airport decision suggests that restrictions of the type sought by Fort Worth would violate an airport's obligations under its grant assurances, although the FAA stated that it was not deciding the Love Field issues. Centennial Decision at 30, n. 7.

following existing law on those issues. Critical to this decision is the lack of any showing that there is a legitimate need (a need recognizable as proper by judicial and administrative interpretations of federal law) for stopping airlines from operating the Love Field services authorized by the Shelby Amendment.

This decision does not undermine the authority of earlier decisions allowing an airport proprietor to impose reasonable and non-discriminatory restrictions on the use of an airport when those restrictions are demonstrably necessary to achieve a rational goal. *See, e.g., Western Air Lines v. Port Authority of New York & New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert, denied*, 485 U.S. 1006. Indeed, in beginning this proceeding the Department stated that it would not consider whether Dallas may take other action to limit the scale of operations at Love Field to alleviate Fort Worth's concerns over the increased scope of service authorized by the Shelby Amendment. Order 98-8-29 at 4-5. The Department has no intention of taking away an airport's ability to reasonably manage its operations. In that regard, the FAA has taken enforcement action against the Arapahoe County Public Airport Authority for excluding scheduled carrier operations at Centennial for which no additional airport operating authority is required by the airport. However, the FAA would not compel the airport to apply for an airport operating certificate that would be needed for scheduled service operated with aircraft with more than thirty seats. Centennial Decision at 19.

American argues that a decision allowing more service at Love Field and thereby invalidating the Bond Ordinance's restrictions will frustrate efforts by other cities to

create regional airports, efforts which assertedly require restrictions on airline service at existing airports. American Comments at 31; American Reply at 17-19. American's concerns are misplaced. Airport owners may be able to restrict service at one airport when necessary to ensure the survival of a second airport. *Cf. City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The Department is not deciding here whether the Bond Ordinance's restrictions on Love Field service were valid when the cities originally built DFW to replace their local airports. The Department is interpreting the applicable federal statutes in this proceeding in light of the current situation, thirty years after the Bond Ordinance's adoption, when no one has cited evidence suggesting that expanded Love Field service along the lines permitted by the Shelby Amendment will undermine DFW's viability or end that airport's role as the area's primary airport.

ISSUE ONE: THE SCOPE OF DALLAS' PROPRIETARY RIGHTS

The principal basis of the dispute over expanded Love Field service is Fort Worth's claim that Dallas has obligated itself to restrict service at that airport. Dallas' commitments to Fort Worth allegedly require Dallas to block airlines from operating the additional services authorized by the Shelby Amendment. Fort Worth bases this claim on the Bond Ordinance, which, as described above, obligated the two cities to transfer all interstate airline service from their local airports to DFW to the extent legally permissible.

American and the DFW Board support Fort Worth's claim that Dallas' commitments to Fort Worth require it to restrict Love Field service. The Dallas parties disagree. They contend that Dallas does not have the authority under federal law to restrict Love Field service as sought by Fort Worth.

As a matter of federal law, Fort Worth may enforce its contract claims against Dallas only if federal law allows Dallas as Love Field's owner to impose the kind of restrictions sought by Fort Worth. The statute defining an airport owner's authority to limit service is 49 U.S.C. 41713(b), which bars state and local governments from regulating airline routes, rates, and services, but allows airport owners to exercise their proprietary rights. As explained below, an airport owner's proprietary powers allow it to restrict airline operations only when the restrictions are reasonable, nondiscriminatory, and designed to achieve a legitimate goal. The airport owner, moreover, must show that the restrictions are both necessary and tailored to achieve a legitimate goal.

Dallas' rights as Love Field's proprietor do not allow it to bar airlines from operating the services authorized by the Shelby Amendment. The Department is here considering only one issue, whether Dallas as Love Field's owner may determine which routes may be served from its airport and by which types of equipment. The discussion of this issue begins by explaining the standard for determining whether an airport owner's regulation is within the owner's proprietary powers. The order then analyzes whether the restrictions sought by Fort Worth would be prohibited but for Dallas' proprietary rights and whether

the restrictions could be adopted under Dallas' proprietary powers. No party cited record evidence indicating that the additional Love Field operations authorized by the Shelby Amendment could threaten DFW's viability or displace DFW as the area's dominant airport.

The Statutory Provisions on Preemption and Proprietary Rights

The preemption provision, 49 U.S.C. 41713(b), including the exception for the exercise of the proprietary rights of airport owners, reads as follows:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide transportation under this subpart.
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> . . . .
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> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

Congress enacted this provision when it deregulated the domestic airline business in 1978. Congress did so "[t]o ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992), quoted in *American Airlines v. Wolens*, 513 U.S. 219, 222 (1995). As part of

deregulation, Congress eliminated the Board's power to determine which routes could be operated by an airline. Section 1601(a)(1)(c) of the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705 (1978), terminating section 401(e)(1) of the Federal Aviation Act, then codified as 49 U.S.C. 1371(e)(1). Congress had determined that the public would benefit if each airline was able to choose which markets it would serve in response to market demands. Allowing state and local governments to regulate routes would frustrate Congress' policy.

The Scope of the Proprietary Rights of Airport Owners

A restriction imposed by an airport proprietor must be "reasonable, nonarbitrary, and non-discriminatory" and "avoid even the appearance of irrational or arbitrary action." *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 89 (2nd Cir. 1998). The Department's own policy statement, originally adopted by the Board, similarly states that an airport owner's conduct is not preempted as an exercise of its proprietary powers "when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective in a manner that does not conflict with the provisions and policies [of the aviation provisions of Title 49]." 14 C.F.R. 399.110(f). *See also* Centennial Decision at 28, citing *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977).

The principal example for airport owners' exercise of their proprietary powers is their need to restrict operations in order to limit their liability for noise. *Western Air*

Lines v. Port Authority, supra, 658 F. Supp. at 956. However, court decisions have allowed airport owners to restrict service for reasons other than limiting noise, as explained below.[8]

In the leading case, *Western Air Lines v. Port Authority,* a district court upheld a perimeter rule adopted by the Port Authority of New York and New Jersey for LaGuardia in a decision affirmed by the Second Circuit. The Port Authority adopted the rule to force airlines to use JFK, another Port Authority airport, for all nonstop longhaul flights. The perimeter rule restricted nonstop flights at La Guardia to a maximum distance of 1500 miles (with a grandfather exception for Denver flights).

While the district court held that airport owners could regulate subjects other than noise, such as congestion, 658 F. Supp. at 956-957, the court stated the proprietor's power was limited to "the issuance of reasonable, nonarbitrary and nondiscriminatory rules that advance the local interest." 658 F. Supp. at 958. The district court concluded that the perimeter rule met this standard

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[8] The courts have long held that a state or local government may not restrict airport operations on noise grounds unless that government is the airport's proprietor. *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973); *San Diego Unified Port District v. Gianturco,* 651 F.2d 1306 (9th Cir. 1981), *cert. denied,* 455 U.S. 1000. Fort Worth is not Love Field's proprietor. It contends, however, that Dallas obligated itself to restrict service at Love Field in order to carry out the cities' joint goal of establishing DFW as the area's dominant airport and that it has the right to enforce Dallas' obligations. This order assumes that Dallas' agreement with Fort Worth does give the latter the right to enforce Dallas' contract obligations, to the extent they are consistent with federal law.

because Port Authority studies had demonstrated its need for the rule. La Guardia was operating at or near the limits of its capacity in certain areas, which had already created delays and congestion. The Port Authority believed that allowing longer flights (and thus more leisure traffic) at LaGuardia would increase delays and congestion. The district court thus upheld the rule on the ground that it was reasonably designed to alleviate demonstrated problems at LaGuardia by shifting longhaul traffic to JFK and was therefore a legitimate exercise of the proprietary powers of the operator of a multi-airport system. 658 F. Supp. at 959-960.[9]

On appeal the Second Circuit essentially adopted the district court's analysis as its own. The Second Circuit stated, " . . . we agree with (the district court's] conclusion that the rule, at least when enacted by a multi-airport proprietor such as the Authority, falls within the proprietary power of airport operators exempted from preemption [by the statute]." 817 F.2d at 226.[10]

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[9] An earlier district court decision, *Aircraft Owners & Operators Ass'n v. Port Authority*, 305 F. Supp. 93 (E.D.N.Y. 1969), is consistent with *Western Air Lines*. That decision upheld peak hour fees imposed by the Port Authority on general aviation to reduce demonstrated congestion problems.

[10] When Delta, which had acquired Western, asked the Supreme Court for certiorari, the United States filed a brief opposing Delta's petition; exhibit 9 to American's comments is a copy of this brief. The brief stated that an airport's proprietary powers included the power to take reasonable steps to prevent congestion and that, "[i]n a multiple-airport context, imposing restrictions that reduce congestion at a busy airport in order to encourage use of a less crowded airport may be a reasonable way to relieve congestion." United States Brief at 6.

The Fifth Circuit also upheld a perimeter rule adopted by the FAA for Washington National Airport (now Ronald Reagan Washington National Airport). *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The Court held that the FAA's rule barring longhaul service at National was a rational means of encouraging airlines to move flights to the then little-used facilities at Dulles International Airport. As the court pointed out, since the perimeter rule had been adopted by the FAA, a federal agency, the decision did not involve an interpretation of the statutory preemption provision. 679 F.2d at 1194. The Court stated, however, that the FAA's position as the airports' proprietor gave it the authority to adopt the perimeter rule. 679 F.2d at 1196.[11] The Fifth Circuit observed, "Already empty for much of the day with a [perimeter] rule, Dulles might, if we invalidate the perimeter, cease to exist." 679 F.2d at 1191. The Court also relied on evidence that National Airport was plagued with problems such as "overcrowded parking lots and aircraft aprons, insufficient counterspace, traffic congestion, too little baggage claim area, [and] harsh environmental effects on the airport's neighbors." 670 F.2d at 1193.

On the other hand, in *Pacific Southwest Airlines v. County of Orange*, No. CV 81-3248 (C.D. Calif. Nov. 30, 1981), a district court held in an unpublished decision that the airport proprietor, which operated only one airport,

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[11] The FAA's preliminary decision in the Centennial Airport case stated, however, that the Fifth Circuit decision does not provide useful guidance for determining the scope of the proprietary rights of a local or state government acting as an airport owner. Centennial Decision at 30, n. 8.

could not impose a perimeter rule. The Fifth Circuit reasoned in *City of Houston* that this result was correct, because federal law did not allow the proprietor of a single airport to impose a perimeter rule. 679 F.2d at 1194.

The Second Circuit recently held that New York City as the proprietor of a Manhattan heliport could impose restrictions on helicopter operations there in order to reduce noise but could not regulate helicopter flight paths. *National Helicopter Corp. v. City of New York*, 137 F.3d 81 (2nd Cir. 1998). The Court, moreover, construed its earlier decisions as allowing an airport proprietor to impose restrictions only in order to address noise and other environmental problems. 137 F.3d at 88.[12]

In sum, the courts have allowed airports to impose restrictions on airline operations but have required such restrictions to be justified by proof that the restrictions were necessary to carry out a legitimate airport goal. No court has held or suggested that one airport may adopt a perimeter rule to protect a different airport from competition or that a proprietor's rights include the right to limit competition between airports operated by different proprietors.

The Board and FAA have similarly interpreted the scope of an airport proprietor's rights. When the Board granted Southwest's application for Love Field-New Orleans authority, the Board summarily rejected the argument by the Dallas/Fort Worth Parties and American that Dallas'

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[12] The city had not received federal funds for the heliport and therefore was not subject to grant restrictions.

proprietary rights allowed it to block Southwest's service. *Southwest Airlines Automatic Market Entry*, 83 CAB 644 (1979). The Board stated that the airport proprietary rights provision was not intended to give airport operators "veto power over Board decisions." At that time the Board intended to address the proprietary rights issue in detail in another Love Field proceeding and so discussed the issues only briefly in the order in the first proceeding. 83 CAB at 651-652. The Board, however, never issued a final decision in the second proceeding due to the Wright Amendment's enactment; this statement in the Southwest case appears to be its only ruling on the extent of Dallas' rights as a proprietor. Nonetheless, the Board's language, while curt, clearly held that Dallas could not use its proprietary powers to bar an airline from operating a route at Love Field.

More recently, the FAA Director's Determination concluded that the Arapahoe County Public Airport Authority had violated the preemption provision, 49 U.S.C. 41713, as well as other federal laws, by refusing to allow Centennial Express to operate scheduled service at Centennial Airport when other carriers were allowed to operate non-scheduled services at that airport with similar equipment. The FAA determined that the airport operator had thereby violated the preemption provision. The FAA reasoned that the airport authority's ban on scheduled service at Centennial Airport was a form of route regulation prohibited by the preemption provision: "[The airport authority's] unilateral ban on scheduled service also represents a regulation of air carrier routes, because the effect of the ban is to prohibit regular operations over any

route involving the Centennial Airport." Centennial Decision at 29. As the FAA noted, "[T]his unilateral ban on scheduled service creates an inherent conflict with Federal law, which permits an air carrier holding authority to provide scheduled passenger service to provide that service to any airport in the United States." *Ibid.* The ban on scheduled service at Centennial Airport was not a permissible use of the airport authority's proprietary powers, since the authority had not provided an adequate justification for the ban. Centennial Decision at 30-31.

The FAA declared, moreover, that "[p]otential economic harm to another airport would never justify an access restriction under the grant assurance that requires Centennial Airport to be accessible to all categories of aeronautical users on reasonable terms, except possibly in the limited circumstances of a single operator of a multiple airport system . . . . " Centennial Decision at 25.[13]

Finally, the Department held that the Massachusetts Port Authority violated the statutory preemption provision, among other provisions, by adopting a fee structure at Boston's Logan International Airport that was unreasonable. *Investigation into Massport's Landing Fees,* FAA Docket 13-88-2 (December 22, 1988), Opinion at 11, a

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[13] The FAA issued its preliminary determination after the Colorado Supreme Court held that the airport's conduct was lawful. *Arapahoe County Public Airport Authority v. Centennial Express Airlines,* 956 P.2d 587 (Colo. 1998). The Colorado court, however, recognized that its reasoning would not authorize Dallas to restrict service at Love Field, for the court pointed out that Centennial Airport, unlike Love Field, was attempting to bar a type of airline operation (scheduled service) that had never existed at that airport. 956 P.2d at 596, n. 12.

decision affirmed by the First Circuit in *New England Legal Foundation v. Massachusetts Port Authority, supra*. The Department noted, among other things, that Massport had designed the fees to impose unjustified additional costs on smaller aircraft to discourage them from using Logan. As such, Massport's imposition of the fees did not constitute a valid exercise of its rights as an airport proprietor, Opinion at 9:

> [To raise fees] during times when there is no shortage of runway capacity penalizes smaller aircraft users when they are not imposing congestion-related costs on other users. This action by Massport, which unreasonably regulates and manages the type and frequency of access to the airport by air traffic, exceeds its authority as an airport proprietor and intrudes into areas that have been federally preempted.

The Nature and Purpose of the Restrictions Sought by Fort Worth

The question then is whether the restrictions sought by Fort Worth satisfy the standard for a valid airport restriction on airline services, that is, whether those restrictions would be reasonable, non-discriminatory, and necessary for achieving a legitimate goal.

Fort Worth seeks to prohibit all service with large aircraft between Love Field and points outside the Love Field service area created by the Wright Amendment (that is, Texas and the four states bordering on Texas). Those restrictions are equivalent to route regulation. In the initial Southwest litigation, both the district court and the Fifth Circuit observed that Dallas' decision to prohibit Southwest from operating scheduled service at Love

Field constituted route regulation. *City of Dallas, supra,* 494 F.2d at 777; 371 F. Supp. at 1024-1025. Section 9.5A of the Bond Ordinance, moreover, gives the DFW Board the power to waive the restriction against using another area airport for interstate service on the basis of an overriding public need for decentralized interstate airline services. In other words, the DFW Board would determine whether public demands justify new airline service at other airports, a determination exactly like the kind of route decisions made by the Board before deregulation, when the Board sometimes specified the airport that must be used for a service.[14] Such action by the DFW Board would be an attempt to undo federal deregulation by imposing its own regulation.

Fort Worth's demands may also frustrate airline plans to develop a specific type of service. For example, as the district court pointed out in the initial Southwest litigation, Dallas' efforts to block Southwest from using Love Field amounted to service regulation, since a short-haul airline like Southwest was necessarily dependent on using a close-in airport to attract passengers. *City of Dallas, supra,* 371 F. Supp. at 1031-1032.

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[14] The Department has recognized that different airports in a metropolitan area can be separate markets, so that service to one airport does not necessarily meet the needs of the market at an alternative airport. The Department therefore granted slot exemptions for low-fare airlines at Chicago's O'Hare International Airport and New York's LaGuardia Airport on the ground that the airport-to-airport routes at issue constituted separate markets justifying slot awards, even though comparable service existed at Chicago's Midway Airport and other New York City airports. *See, e.g.,* Orders 98-4-21 (April 21, 1998) at 13-14 and 98-4-22 (April 21, 1998) at 18-19.

Unless authorized by the proprietary rights exception for airport owners, Fort Worth's demands are plainly inconsistent with the statutory preemption provision. Congress amended our governing statute to end all regulatory authority to determine what domestic routes an airline may fly; the statute provides that our grant of domestic operating authority authorizes an airline to operate anywhere in the nation. Section 1601(a)(1)(c) of the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705 (1978), terminating section 401(e)(1) of the Federal Aviation Act, then codified as 49 U.S.C. 1371(e)(1). Fort Worth wishes to deny airlines the ability to choose which Dallas-Fort Worth routes they will serve through Love Field, even when the Shelby Amendment would allow service on the routes.

Dallas would clearly violate the preemption provision by imposing the restrictions on Love Field service sought by Fort Worth, unless Dallas' proprietary rights allow it to limit service in that manner.

Dallas' Ability as the Airport's Proprietor to Restrict Love Field Service

Applying the principles established by the judicial and agency decisions discussed above, the Department concludes that Dallas' rights as Love Field's owner do not allow it to restrict Love Field service as sought by Fort Worth. As shown, these decisions demonstrate that an airport owner's ability to restrict the type of service operated at its facilities is limited in that any such restrictions must be non-discriminatory, reasonable, and based on a showing that they are necessary to achieve legitimate

airport goals. The Fort Worth parties have made no showing that the restrictions they wish to impose on Love Field service meet this standard.

First, Fort Worth is not trying to limit the environmental impact of increased service at Love Field (nor could it, since the airport is not located in Fort Worth). Fort Worth instead seeks to impose limits on Love Field service in order to protect the competitive position of DFW. *See, e.g.*, Fort Worth's Third Amended Petition, *City of Fort Worth, Texas v. City of Dallas, Texas, et al.*, at 16-18; exhibit 16 to American's Comments is a copy of Fort Worth's petition.

Neither the courts, the Board, nor this Department or any element of this Department have stated that a local government may impose restrictions at its own airport or a neighboring airport in order to limit competition for another airport preferred by that government. Such restrictions would be contrary to the very essence of deregulation, which is intended to promote competition. Fort Worth seeks to restrict Love Field service in order to avoid the competition inherent in a deregulated industry.

The closest analogies to the type of restrictions sought by Fort Worth are the National Airport and LaGuardia perimeter rules. When the courts upheld those rules in *Western Air Lines* and *City of Houston*, they did so on the ground that the airport owner had shown that the rules were necessary to achieve legitimate goals of the owner – the prevention of congestion and delays. The Fifth Circuit additionally relied on evidence showing that the lack of a perimeter rule could force the FAA to close Dulles. Here, in contrast, Fort Worth seeks to restrict service at Love Field only in order to reduce competition for DFW, as

shown by Fort Worth's complaint in the state court (the Third Amended Petition cited above) and has neither claimed nor shown that additional Love Field service would make DFW unviable. The goal of reducing competition for one airport cannot justify imposing restrictions on a second airport, when the goal is merely to prevent some service from being diverted to the second airport and to increase revenues at the first airport.

In addition, even if Dallas could restrict Love Field service to protect DFW's revenues, the restrictions sought by Fort Worth would not be a rational means of achieving that goal. Any restrictions imposed by an airport proprietor on airline service must be reasonably necessary to carry out a legitimate goal and be nonarbitrary and nondiscriminatory.

The restrictions sought by Fort Worth do not meet that standard. The city seeks, for example, to prohibit all large aircraft service to service to points outside Texas and the four states bordering on Texas (the Love Field service area established by the Wright Amendment) – nonstop flights, one-stop flights, through service, and interline service. Its proposed restrictions would create such anomalous results as allowing unrestricted service with large aircraft to cities such as Albuquerque and New Orleans, while prohibiting nonstop, through, and interline service to cities such as St. Louis and Birmingham. In contrast, the perimeter rules upheld in *Western Air Lines* and *City of Houston* barred only nonstop flights – the rules allowed stopping flights, through service, and interline service. Fort Worth has not justified its proposed restrictions on service to points outside the Love Field service area created by the Wright Amendment. Similarly,

Fort Worth has provided no justification for allowing unrestricted service with aircraft with a passenger capacity of 56 passengers or less while imposing severe restrictions on service operated with larger aircraft. Fort Worth has presented no rational connection between those specific restrictions and Fort Worth's desire to protect DFW, and no showing that the specific restrictions are reasonably necessary to achieve Fort Worth's goals.

While the restrictions sought by Fort Worth are largely the restrictions imposed by the Wright Amendment, that fact cannot validate the cities' adoption of those restrictions.[15] Congress has wide latitude in carrying out its powers to regulate interstate commerce. A state or local government, in contrast, may restrict service at an airport only by showing that the restrictions are necessary to carry out a legitimate goal, are not arbitrary or discriminatory, and are reasonable. *See, e.g., National Helicopter Corp., supra,* 137 F.3d at 89; *British Airways Board v. Port Authority of New York & New Jersey,* 564 F.2d 1002, 1011 (2nd Cir. 1977).

The Fort Worth parties, citing *Western Air Lines* and *City of Houston,* essentially assume that the courts will approve almost any airport perimeter rule, for those parties have made no effort to show that the Bond Ordinance's restrictions are currently needed. That assumption is erroneous. The courts have upheld perimeter rules when the airport owner demonstrated that the rule was

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[15] As explained below, the Wright Amendment's commuter aircraft exemption allows longhaul Love Field service with regional jets, notwithstanding Fort Worth's claims to the contrary.

needed to alleviate congestion and environmental problems (or, in the case of National, in part to keep the airport owner from having to close its other airport).

Nothing in the plain language of the statute supports Fort Worth's position that Dallas' proprietary rights would allow Dallas to block services authorized by the Wright and Shelby Amendments. While the Fort Worth parties attempt to rely on the Wright Amendment's conference committee report, the report does not support their position. The report stated, "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively, apply to the authority to serve Love Field on interstate flights authorized by the amendment." H.R. Rep. No. 96-716 at 26. Fort Worth and its supporters focus on the report's statement that the statute preserved Dallas' proprietary powers and ignore the statement that Dallas remained subject to the statutory preemption provision. The report clearly states that Dallas must comply with the statutory preemption provision. And, as shown, Dallas' proprietary rights did not allow it to regulate service at Love Field. Fort Worth's position would have permitted Dallas to override the Wright Amendment by declaring that any airport proprietor has the right to ignore a Congressional enactment.

Fort Worth additionally cites a 1980 House committee report that stated that the committee believed that an airport could deny access to an airline (or deny additional facilities to an incumbent airline) when another airport in the metropolitan area was capable of providing adequate facilities for the airlines. Fort Worth Comments at 25, citing H.R. Rep. No. 96-887, 96th Cong., 2d Sess.

(1980), part 2 at 15-16. The committee's statement is contrary to judicial and agency decisions on the scope of an airport owner's proprietary rights. The committee, moreover, was stating its view of the existing law, not the purpose of new legislation. As such, its statement is not persuasive authority. *See, e.g., Ohio Public Employees Retirement System v. Betts.* 492 U.S. 158, 167-168 (1989).

The Department's conclusion that Dallas may not regulate Love Field service as demanded by Fort Worth in no way means that airport owners may not use their proprietary powers for legitimate purposes. However, as to airport restrictions that would otherwise violate the statutory preemption provision, the courts have stated that "airport proprietors have an 'extremely limited role' in the system of aviation regulation." *Western Air Lines v. Port Authority of New York and New Jersey,* 658 F. Supp. 952, 955 (S.D.N.Y. 1986), *aff'd,* 817 F.2d 222 (2nd Cir. 1987), quoting *British Airways Board, supra,* 564 F.2d at 1010.

The Fort Worth parties have made no effort to show that barring airlines from operating the services authorized by the Shelby Amendment is now necessary to carry out a permissible goal for an airport proprietor. To the extent that they argue that the restrictions are reasonable, they base their claims on the validity of the cities' original agreement, made thirty years ago. They also construe the Fifth Circuit's decision in *City of Houston* as authorizing Dallas to impose additional restrictions on Love Field service beyond those imposed by federal statute to ensure DFW's role as the area's principal airport, even though the Shelby Amendment has only modestly expanded the types of service already allowed by the Wright Amendment. Neither theory is persuasive, as discussed next.

DFW's Viability

Dallas' proprietary rights arguably would it allow to restrict service if necessary to protect the viability of DFW. However, the Wright and Shelby Amendments currently impose significant restrictions on the airlines' use of Love Field. The Fort Worth parties have cited no evidence showing that the additional Love Field services authorized by the Shelby Amendment would in any way threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport.[16] The Dallas parties, on the other hand, have presented evidence and reasoning demonstrating that no significant harm to DFW is likely.[17]

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[16] The Department is addressing the proprietary rights issue in terms of the Love Field dispute, which is how the parties presented their arguments. American wrongly asserts that the Department framed this issue as an abstract issue without reference to the particular facts of Love Field. American Comments at 3-5, 12. The Department stated that it intended to consider the federal law issues in an effort to help resolve the Love Field dispute. Order 98-8-29 at 4-5. It did not intend to establish a national policy applicable to all airport situations rather than just Love Field. The parties' comments, including American's comments, demonstrate the parties' expectation that the Department would decide whether Dallas' proprietary rights allowed it to restrict Love Field service as demanded by Fort Worth. Their comments present in detail their factual and legal arguments on this issue. *See, e.g.*, American Comments at 12-30. In addition, the airport trade associations and Delta urge the Department to limit its ruling on the first issue to the specific facts of Love Field. ACI/AAAE Comments at 6-7; Delta Reply at 1-2.

[17] Although some parties have suggested that allowing additional Love Field service could undermine the rights of DFW's bondholders, no party has argued that additional Love

First, DFW has been very successful, and its success is a tribute to the cities' willingness to work together to create that airport. The Wright and Shelby Amendments, moreover, continue to impose substantial restrictions on Love Field service. An airline operating large aircraft may not operate nonstop or stopping flights from Love Field to any point outside the eight-state Love Field service area and may not offer through service or interline service from Love Field to any such point. While airlines may provide longhaul service with aircraft with a passenger capacity of 56 passengers or less, using aircraft with a small number of seats for longhaul markets is usually less efficient. Legend Reply at 15. Indeed, Southwest for a number of years has been the only airline willing to operate service with large aircraft at Love Field subject to the restrictions imposed by the Wright Amendment.

Secondly, while Southwest has greatly increased the scale of its operations at Love Field since it began operations, that has not kept DFW from growing. DFW's passenger enplanements have risen from 11.3 million in 1979 to 60.5 million in 1997. While DFW had 60.5 million enplaned passengers in 1997, Love Field had only 3.4 million. Continental Express Reply at 2.

In 1997 Southwest operated an average of 270 daily flights at Love Field. The services proposed by Legend, Continental Express, and others will increase that number by ninety flights per day; even so, that level of service will be a small fraction of the 2,800 flights operated each

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Field service would actually injure the bondholders' interests. No representative of the bondholders has filed comments in this proceeding.

day at DFW. Legend Comments at 47, 63. Even if other airlines add interstate flights, Love Field cannot overtake DFW as the area's primary airport. In addition to the statutory restrictions, Love Field has a relatively small number of available gates. *Love Field Study* at 51-54.[18]

Moreover, the court decisions on the scope of airport proprietary rights, especially the perimeter rule cases, insist that airports imposing such restrictions must demonstrate a need for the restrictions. The pleadings filed by the Dallas parties pointed out the importance of a showing of need as an essential condition to an affirmance of an airport perimeter rule. *See, e.g.*, Dallas Comments at 23-26; Legend Comments at 89-90. Notwithstanding their arguments, and the courts' express reliance on such a showing, none of the parties seeking restrictions on Love Field service made any effort to show that current conditions require a prohibition against the operation of the services authorized by the Shelby Amendment.

Equity and Estoppel

Some of the parties opposing additional Love Field service contend that allowing more service at Love Field

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[18] Other metropolitan areas have multiple airports and still have a dominant airport comparable to DFW, even though service at the secondary airports is not legally restricted. For example, O'Hare is the dominant airport at Chicago, Bush Intercontinental at Houston, Los Angeles International at Los Angeles, and San Francisco International in the San Francisco Bay Area. The secondary airports comparable to Love Field are Midway at Chicago; Hobby at Houston; Hollywood-Burbank, Ontario, and Long Beach in Los Angeles County; and Oakland and San Jose in the Bay Area.

now would unfairly reverse the cities' expectations that all interstate service would be operated from DFW and injure those parties who allegedly relied on the support of the Civil Aeronautics Board and other federal agencies for the cities' original plan to replace the local airports with DFW. *See, e.g.*, Fort Worth Comments at 4-7. They allege in particular that the two cities agreed to build DFW and close their local airports to airline service largely as a result of the Board's pressure. The DFW Board sums up its position with the phrase, "a deal is a deal." DFW Comments at 3.[19]

Any agreement between the cities on airport operations was always subject to federal statutory law, as recognized by the Bond Ordinance's terms. The DFW Board's estoppel argument misconstrues the two cities' original agreement to move all interstate service to DFW. The Bond Ordinance only required the two cities to end all interstate service at their local airports to the extent "legally permissible." When the U.S. district court initially held that Southwest was entitled to use Love Field, the court reasoned that the Bond Ordinance by its terms did not prohibit all airline service .at Love Field. *City of Dallas, supra*, 371 F. Supp. at 1019, 1035.

Even without the "legally permissible" qualification in the Bond Ordinance, the cities knew that the operation of

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[19] Fort Worth, however, has developed Alliance Airport as a major cargo airport. According to Legend, Fort Worth's development of Alliance is inconsistent with the Bond Ordinance, which requires all interstate scheduled service (both passenger and cargo) to be operated at DFW, to the extent legally permissible. Legend Comments at 42-43.

DFW and each city's local airports would be subject to regulation by Congress and executive branch agencies. The cities could reasonably expect that regulatory policies would change over the years as the airline business itself changed.

The cities, after all, adopted the Bond Ordinance thirty years ago. Since then the airline industry has been transformed. Congress deregulated the airline industry and took away the Civil Aeronautics Board's authority to determine which airline should fly which route. Now each airline can determine what routes it wants to fly and what kind of service it should offer. Southwest's success is the prime example of the benefits created by deregulation, for Southwest never would have developed into a major airline under the regulatory scheme in place in the 1960's. Moreover, airline traffic in the Dallas-Fort Worth area has quintupled. Continental Express Reply at 2.

In carrying out its authority to regulate interstate commerce, Congress can and does take into consideration changes in the airline industry. Airline services are uniquely subject to federal control. It is Congress that authorized the deregulation of airlines in the expectation that market forces would then drive airline decisions on what services to provide. Nevertheless, Congress has always had the authority to determine what airline services may or may not be operated at any airport. If Congress determines that the restrictions on Love Field should be liberalized, as it did in 1997, the Department is obligated to comply with that determination. In any event, nothing indicates that the Shelby Amendment could significantly weaken DFW's position as the Dallas-

Fort Worth area's principal airport. Thus, the amendment will not frustrate the cities' original goal underlying their creation of DFW as the regional airport. Our interpretation of Congress' action accordingly cannot undermine the two cities' plan to maintain DFW as the area's principal airport.

Fort Worth's Contract and Takings Claims

Fort Worth makes a related claim, that a decision allowing the services authorized by the Shelby Amendment would assertedly violate its Constitutional rights by taking Fort Worth's property without compensation and by impairing its rights under its agreement with Dallas. Fort Worth Comments at 21-23.

Here the Department is merely interpreting statutes that Congress has already enacted, not creating new obligations and mandates on its own. Thus the question is whether Congress has violated Fort Worth's rights. Any question about Congress' authority to determine the scope of permissible service at Love Field has been dispelled twice by the federal courts. *Cramer v. Skinner, supra; State of Kansas v. United States, supra.* Fort Worth never asserted that the Wright Amendment violated its Constitutional rights, even though that statute authorized much more interstate service than is authorized by the Shelby Amendment. We think that Congress' authorization of additional Love Field service under its power to regulate interstate commerce has not injured Fort Worth's Constitutional rights.

If Fort Worth's Takings Clause argument were read as an argument that Congress' regulation of airport operations

has interferred with Fort Worth's ability to gain the maximum advantage from its partial ownership of DFW, the claims would have no merit. Congress frequently imposes regulations on the use of property that may diminish its value. Unless the regulation in question causes a substantial reduction in the value of the property and interferes with the owner's legitimate investment expectations, there is no taking. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986); *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 643-646 (1993); *Andrus v. Allard*, 444 U.S. 51 (1979).[20]

Furthermore, Congress may license firms to engage in interstate transportation even if that overrides exclusive rights created by state or local law. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1 (1824). The Constitution also does not protect a firm from new competition later authorized by a state or federal government, unless the first firm had an express guarantee that no new competition would be created. *Charles River Bridge v. Warren River Bridge*, 36 U.S. 420, 551-553 (1837). As a result, even if the Shelby Amendment significantly reduces DFW's future revenues, Congress' enactment of that statute could not violate Fort Worth's Constitutional rights.

In any event, Fort Worth's contention that a statutory interpretation allowing more service at Love Field will violate its contract rights has no merit. First, the Bond Ordinance itself requires the cities to move interstate service to DFW only to the extent doing so is legally

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[20] As Dallas points out, Dallas owns Love Field, and the federal statutes, insofar as they restrict the use of any property, restrict the use of Love Field. Dallas Reply at 10-11.

permissible. In the first round of the Southwest litigation, the district court, as shown, held that the Bond Ordinance means what it says. *City, of Dallas, supra,* 371 F. Supp. at 1019, 1035. Dallas has stated that it never agreed to violate federal law by signing the Bond Ordinance. Dallas Reply at 10. Secondly, parties may not enforce contracts that are contrary to federal law, and they may not avoid federal requirements by characterizing their conduct as contractual in nature. *See, e.g., City and County of San Francisco v. FAA,* 942 F.2d 1391, 1399 (9th Cir. 1991). And Congress and federal agencies may adopt policies invalidating existing contracts between private parties. *See, e.g., See* [sic] *Republic Airlines v. United Air Lines,* 796 F.2d 526 (D.C. Cir. 1986).

Dallas' Status as an Airport Owner

The two court decisions upholding a perimeter rule – *City of Houston* and *Western Air Lines* – did so on the ground that the rule was a reasonable and necessary means for an airport proprietor to allocate airline operations between two or more airports controlled by that proprietor. As discussed, if Dallas were viewed as controlling Love Field and DFW, it could not impose restrictions of the kind sought by Fort Worth without a showing that they are necessary to achieve legitimate airport goals.

While the Fort Worth parties believe that Dallas is the owner of a multi-airport system, given its ownership of Love Field and its majority of ownership of DFW, Dallas contends that it is not. The Department agrees with Dallas – Dallas may not be viewed as the operator of a multi-airport system for purposes of those decisions.

The Department recognizes that Dallas is deemed the owner of seven elevenths of DFW and chooses seven of the eleven members of the DFW Board. *See, e.g.*, American Comments at 13. Nonetheless, Dallas does not control DFW, as demonstrated most obviously by DFW's disagreement here and in the state court proceeding with Dallas' position on the interpretation of federal law. In addition, section 9.5B of the Bond Ordinance states that the DFW Board may only grant an airline a waiver allowing it to use a different airport for interstate service with the approval of eight of the eleven Board members. Fort Worth's representatives thus have a veto over the grant of any such waivers, and Dallas does not have the ability to allocate services between Love Field and DFW.[21]

One court held that a city may be deemed the airport's proprietor only when it has kept the power to regulate airport operations. The Court held that a city that has leased the management and operation of its airport to a private firm is no longer the proprietor for purposes of determining whether the city may regulate airport operations to reduce noise. *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983). Similarly, in the Centennial Decision the FAA ruled that an airport owner may not restrict service at one airport as part of an allocation of services between airports unless the owner controls both airports: "The owner must be in a position to assure that all classes

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[21] While Dallas controls other airports, like Redbird, Dallas' ability to restrict service at Love Field would depend on whether it controls DFW, the airport to be benefited by those restrictions, not on whether it controls another airport unaffected by the restrictions, for purposes of this discussion.

of aeronautical needs can be fully accommodated within the system of airports *under the sponsor's control* and without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall aviation system capacity." Centennial Decision at 24 (emphasis added).

ISSUE TWO: PREEMPTION BY THE WRIGHT AND SHELBY AMENDMENTS

In addition to considering whether Dallas may restrict Love Field service under its rights as the airport's proprietor under 49 U.S.C. 41713, the Department stated that it would consider whether Congress' enactment of the Wright and Shelby Amendments by themselves preempted Dallas' ability to restrict services authorized by those statutes. On this issue the Fort Worth parties essentially contend that the Wright and Shelby Amendments govern only the conduct of the federal government (that is, this Department and the Board) and grant no affirmative right to any airline to operate interstate service at Love Field. The Dallas parties, on the other hand, contend that the two statutes override the cities' agreement to limit service and prohibit Dallas from barring service permitted by the Wright and Shelby Amendments.

The Department finds that the Wright and Shelby Amendments preempt the cities' ability to regulate service at Love Field.

Whether a federal statute or rule preempts state and local government regulation depends on the intent of Congress. As the Supreme Court has explained, "Preemption may be express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's

language or implicitly contained in its structure and purpose.' " *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (citations omitted).

The Wright and Shelby Amendments, unlike the Federal Aviation Act provisions now codified in Title 49 of the U.S. Code, contain no express preemption provision (as discussed below, however, the conference committee report on the Wright Amendment mentioned the issue). The lack of such a provision, however, does not end the matter, for statutes without an express preemption provision may still preempt state and local regulation.

Congressional legislation will preempt state regulation if Congress' regulation of the area is so extensive that it has occupied the field or if there is a conflict between the state regulation and the achievement of the Congressional purpose. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977). The cities' ability to restrict Love Field service is preempted both because Congress has occupied the field and because allowing the cities to restrict service would frustrate Congress' policies.

The Wright Amendment prescribed in detail the interstate airline services that were and were not permissible at Love Field. The Shelby Amendment modified the zone of permissible interstate service by expanding the boundary of the Love Field service area and clarifying which types of aircraft could be operated under the commuter aircraft exemption. Having chosen to prescribe what interstate service could be operated at Love Field, Congress surely did not intend that Dallas (which in 1980 opposed all interstate service) or other local bodies could override its decision. Given the detailed regulation of

Love Field service set forth in the Wright Amendment, Congress preempted state and local regulation of that area by occupying the field. The same is true for the Shelby Amendment.

An analogous case involved the Supreme Court's decision that the City of Burbank, California, was preempted from regulating noise at Lockheed Air Terminal (now the Hollywood-Burbank Airport). *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). The Court held that the pervasive federal regulation of aircraft noise in particular and flights in general meant that Congress had occupied the field. The Court quoted Justice Jackson's concurring opinion in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303 (1944):

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.

Burbank therefore could not impose a curfew on flights at the airport. 411 U.S. at 633-634.

The Court's reliance in the Burbank case on the pervasive federal regulation of aircraft operations supports our decision here that Congress has occupied the field, which similarly involves flight operations at an airport. In contrast to areas historically subject to state regulation, interstate airline operations have always been intensively and virtually exclusively regulated by the federal government.

In addition, any prohibition by Dallas of operations authorized by the Shelby Amendment would frustrate the Congressional purpose of allowing specified types of interstate service at Love Field. When Congress enacted the Wright Amendment, after all, it knew that Dallas and Fort Worth opposed any interstate service at Love Field. If, as contended by the Fort Worth parties, the Wright Amendment was intended only to limit what the Department and the Board could do and to impose no limit on the cities' ability to carry out the Bond Ordinance, there would have been no point in enacting the statute. Dallas would have used its alleged authority to end all interstate service at Love Field, regardless of what Congress legislated.

The conference committee report makes it clear that Congress intended by enacting the Wright Amendment to affirmatively authorize certain types of interstate service. The report stated that the amendment "provides a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years" and that the settlement "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 96-716 at 24. This statement clearly indicates that Congress was imposing a compromise, which was accepted by all of the parties despite their conflicting interests. Congress' purpose of establishing a compromise would have been frustrated if, as Fort Worth and its supporters argue, Dallas was to be allowed to restrict interstate service unilaterally beyond the limits of the Wright Amendment.

The conference committee report further stated that the Board "will act expeditiously" on any application for authority to operate the services authorized by the Wright Amendment. H.R. Rep. No. 96-716 at 25. That statement, too, shows that Congress had affirmatively determined that airlines should be able to operate the interstate services authorized by the statute, notwithstanding the cities' known opposition to any interstate service. The claim that Congress intended to limit only the Board's authority, not the cities' powers, is illogical – that interpretation would allow the cities to ban the very service that Congress told the Board to authorize.

Thus, even if other airports could use their proprietary powers to restrict service at one airport to protect the competitive position of a second airport, Congress has determined as to Love Field that Dallas' ability to restrict service has been preempted to the extent of the services authorized by the Wright and Shelby Amendments.

The Department recognizes, as the Fort Worth parties point out, that the Wright and Shelby Amendments largely take the form of restrictions on the Department's power (originally the Board's power) to grant certificate authority to airlines to serve Love Field. The Wright Amendment's focus on restricting the powers of the Board (and the Department) makes sense, since Congress had no need to enact provisions blocking the cities from restricting Love Field service. The Board had already held that the cities had no power to veto its grant of authority to an airline to operate a Love Field route. *Southwest Airlines Automatic Market Entry*, 83 CAB 644 (1979). That Board decision caused Congress to enact the legislation limiting the Board's powers to award route authority, but

Congress took no action to overturn the Board's decision that Dallas could not veto such awards.

As a result, the Wright Amendment (and necessarily the Shelby Amendment) must be read as a Congressional authorization for the operation of the specified types of interstate service at Love Field. Thus any restrictions imposed by Dallas that would frustrate that policy are necessarily preempted. *Cf. Fidelity Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982); *Jones v. Rath Packing Co., supra*, 430 U.S. at 541-543.[22]

The Department finds unpersuasive the suggestions by Fort Worth and American that the Wright Amendment only ratified an existing agreement by the cities to allow some interstate service and that the restrictions on interstate service at Love Field resulted from Dallas' exercise of its proprietary rights, not from Congress' exercise of its authority to regulate interstate commerce. Fort Worth Comments at 9; American Comments at 37. Airlines have complied with the Wright Amendment's restrictions because Congress imposed them. The cities, moreover,

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[22] We recognize that we are implying preemption here, despite the lack of an express preemption provision, while our interpretation below of the commuter aircraft exemption is based entirely on the statutory language and our earlier interpretation of the statute. On most questions of interpretation the courts rely on the statutory language. On preemption questions, in contrast, the courts often imply preemption when there is no express preemption provision. The courts are, of course, reluctant to do so as to areas traditionally regulated by the states. The question here involves the regulation of interstate commerce, where the states have always had a smaller and subordinate role.

never amended the Bond Ordinance to reflect their alleged agreement with the Wright Amendment's terms. Legend Comments at 42; Dallas Reply at 12. Their failure to formally incorporate the Wright Amendment limits further demonstrates that they viewed the Wright Amendment as a Congressional determination that was binding on all parties, even though the cities' own agreement – the Bond Ordinance – has always barred services authorized by the Wright Amendment (except as qualified by the phrase "legally permissible").[23]

The Fort Worth parties cite the conference committee report on the Wright Amendment in support of their claim that there is no preemption. *See, e.g.*, Fort Worth Comments at 33. That report, as noted above, stated that the statute would not affect the cities' proprietary rights nor their obligation to comply with the preexisting preemption provision. H.R. Rep. No. 96-716 at 26. But the overall purpose of the statute was, as shown, to allow airlines to operate limited types of service at Love Field, a purpose that would be frustrated if the cities were deemed able to restrict Love Field service. In these circumstances, the report's statement is consistent with the Department's finding that the Wright Amendment was intended to preempt local restrictions on airline service.

Finally, as Dallas points out, the Senate's version of the Shelby Amendment expressly gave Dallas the right to

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[23] Even if the Wright Amendment had codified an agreement by the cities, the parties' rights and obligations would be fixed by the statute, not by the agreement. *Cf. Vollmar v. CSX Transportation, Inc.*, 898 F.2d 413, 417 (6th Cir. 1990).

veto service by reconfigured large aircraft; the conference committee removed that provision. Dallas Comments at 31. This suggests that Congress did not want to give Dallas any ability to block the additional service authorized by the amendment and that Congress believed that Dallas could not block the service unless Congress expressly gave it that authority.

ISSUE THREE: LONGHAUL SERVICE UNDER THE COMMUTER AIRCRAFT EXEMPTION

Legend and Continental Express plan to operate longhaul service from Love Field with jet aircraft, Continental Express with regional jets designed to hold no more than 56 passengers and Legend with large aircraft reconfigured to hold no more than 56 passengers. Both airlines thus seek to operate under the Wright Amendment's commuter aircraft exemption (an exemption modified by the Shelby Amendment), which allows service operated with aircraft having a passenger capacity of no more than 56 passengers.

The Department stated that it intended to address the airlines' ability to operate under the Wright and Shelby Amendments since some parties have argued that the statutes do not allow longhaul service to be operated with aircraft with a passenger capacity of 56 passengers or less. Those parties contend that Congress intended to allow only short-haul service at Love Field, even if an airline used aircraft with a passenger capacity of 56 passengers or less, and that an airline may not operate jet aircraft under the exemption for aircraft with a passenger

capacity of 56 passengers or less. Fort Worth Comments at 41-42; DFW Board Comments at 37-38, 41.

After considering the arguments on this issue, the Department concludes that the Wright and Shelby Amendments authorize longhaul service with any aircraft with a capacity of no more than 56 passengers. The literal terms of both amendments and the history and obvious purpose of the Shelby Amendment show that the statutes allow such service.

As explained above, subsection (c) of the Wright Amendment allowed an airline to provide nonstop or through scheduled passenger service with large aircraft from Love Field only to points within Texas and one of the states bordering on Texas. However, subsection (a) of the Love Field amendment exempted "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less" from the amendment's restrictions on interstate airline service. Unlike subsection (c), subsection (a) imposes no geographical limit on the services operated with the smaller aircraft. Subsection (a) of the Wright Amendment also contained no equipment type restriction, except for the seating capacity limitation.

The Department's 1985 order interpreting the Wright Amendment included a ruling on which airlines could use the commuter aircraft exemption. The Department ruled then, despite the "commuter airline" phrase in the Wright Amendment, that any airline, not just "commuter" airlines, could offer service under the commuter aircraft exemption with aircraft that satisfied the 56-seat limit. Order 85-12-81 at 13. It stated, "Since Congress specified the size of the commuter aircraft, and since such

aircraft has a limited range consistent with other restrictions of the Amendment, we believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative." Order 85-12-81 at 13 (footnote omitted). The Court of Appeals affirmed this interpretation. *Continental Air Lines v. Department of Transportation*, 843 F.2d at 1454-1455.

The opinions given Centennial Express and Dalfort by, respectively, the Department's Deputy General Counsel and General Counsel suggested that the commuter aircraft exemption allowed operations with any aircraft designed to hold no more than 56 seats. Neither opinion indicated that the exemption allowed flights only with limited types of aircraft, although neither expressly held that regional jets were entitled to operate under the exemption. The opinions additionally suggested that there was no limit on the length of flights operated under the exemption. The Deputy General Counsel's letter to Centennial Express, for example, stated the airline could operate flights to Denver under the commuter aircraft exemption with aircraft meeting the 56-seat standard.

The General Counsel's opinion on Dalfort's proposal led Congress to clarify the law. The Shelby Amendment expressly makes the commuter aircraft exemption available to airlines using large aircraft (except widebody aircraft) reconfigured to have a passenger capacity of 56 passengers or less. Congress, on the other hand, did not overturn the Department's 1985 interpretation that, notwithstanding the "commuter airline" phrase, any airline could use the exemption if it operated aircraft with a passenger capacity of 56 passengers or less.

As modified by the Shelby Amendment, the statute places no geographical limit on the length of service operated under the commuter aircraft exemption and prohibits only the use of aircraft with a gross weight of more than 300,000 pounds. Congress thereby has allowed any airline, including Legend and Continental Express, to operate longhaul service at Love Field with any aircraft, except widebody aircraft, that have a passenger capacity of 56 passengers or less.[24]

The Fort Worth parties nonetheless contend that only short-haul service may be operated under the exemption and that only commuter airline flights using nonjet aircraft are qualified to operate under the exemption. The Department cannot agree with these contentions.

Congress initially created the commuter aircraft exemption for short-haul service, but the exemption never included a restriction on equipment type and, unlike subsection (c), never limited the length of service operated under the exemption. The Department cannot

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[24] Rather than base this decision on the stipulation filed by the Government in dismissing Dalfort's petition for review in *Astraea* (exhibit 12 to Dallas' comments is a copy of the stipulation), the Department will show that the language of the Wright and Shelby Amendments and Congress' intent in enacting the Shelby Amendment clearly allow any airline to operate longhaul service with aircraft with a passenger capacity of 56 passengers or less of any equipment type (except widebody aircraft). The stipulation correctly stated that any airline could operate longhaul service under the commuter aircraft exemption as long as it used a type of aircraft allowed by the Shelby Amendment.

rewrite the exemption to add restrictions like that when Congress never chose to do so.

When Congress enacted the Wright Amendment, only turboprop aircraft had a passenger capacity of 56 passengers or less. Since they were relatively unattractive for travellers on long distance flights, airlines could market turboprop service only on short-haul routes. *See* 43 Fed. Reg. 39587, 39589-35890 (September 6, 1978). In recent years, aircraft manufacturers have developed regional jets, which typically have no more than 56 seats and offer attractive service on long flights. Even if this technological change has undermined Congress' expectation as to the impact of the Wright Amendment's commuter aircraft exemption, the Department could not rewrite the statute by including equipment type restrictions that Congress never included. That is shown by an analogous case involving a federal banking statute, *Independent Insurance Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). As the Court stated there, "We decline appellants' invitation to recast the statute to fit contemporary circumstances; when time and technology open up a loophole, it is up to Congress to decide whether it should be plugged, and how." 997 F.2d at 961.

The Department also has no basis for reinterpreting the phrase "commuter airline" to make it a limiting condition on the exemption's use. Thirteen years ago we held that any airline could use the exemption with aircraft with a passenger capacity of 56 passengers or less, and the Court affirmed that interpretation. The Shelby Amendment did not amend the statute to overturn that interpretation. Since Congress is presumed to know how a statute has

been interpreted by the agency responsible for administering it when Congress amends the statute, Congress' failure to overturn that interpretation constitutes a ratification of the interpretation. *See e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1973); *Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1215 (D.C. Cir. 1983). *See also Hilton v South Carolina Public Railways Comm'n*, 502 U.S. 197, 201-202 (1991), emphasizing the importance of following *stare decisis* in statutory interpretation cases.

Even a reinterpretation of the statute limiting the exemption's use to commuter airlines would probably not block regional jet flights at Love Field. As Legend points out, commuter airlines like American Eagle are replacing their turboprop aircraft with regional jets. Legend Reply at 23.

More importantly, even if the Wright Amendment were unclear on these issues, the enactment of the Shelby Amendment shows that Congress no longer intends to limit the commuter aircraft exemption to short-haul service. By expressly allowing any aircraft (except aircraft with a gross aircraft weight of more than 300,000 pounds) to qualify for the exemption, subject only to the maximum 56-passenger capacity limitation, Congress no longer wishes to limit the exemption to short-haul service. After all, the 300,000 pound limitation covers jet aircraft such as B-727's, B-737's, B-757's, some B-767's, and DC-9's that have operating ranges of at least two thousand miles. Congress surely did not view such aircraft as likely to be used only for short-haul service.

While the Shelby Amendment did not specifically address the use of regional jets, Congress' decision to make flights operated with reconfigured large aircraft

eligible for the commuter aircraft exemption, and the lack of any equipment type language in the statute, compel the conclusion that regional jets meeting the 56-passenger capacity standard may also be used under that exemption.

ISSUE FOUR: ENFORCEABILITY OF DFW USE AGREEMENT RESTRICTIONS BARRING LOVE FIELD SERVICE

The DFW Board contends that its use agreements with airlines such as American and Continental bar those airlines from using any other airport in the metropolitan area for interstate service without the DFW Board's approval (an airline that signs a use agreement is called a signatory airline). The DFW Board additionally claims that it is entitled to enforce those agreements, even assuming that the airport may not unilaterally bar airlines from using competing airports, since the airlines waived their rights to use alternative airports. If the DFW Board's position is valid, only airlines that do not serve DFW, such as Southwest and Legend, and non-signatory airlines, airlines that serve DFW without signing a use agreement, would be able to operate interstate service at Love Field.[25]

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[25] While these agreements have been in effect since DFW opened, no one has challenged the clause barring the use of alternative airports for interstate service, since no signatory airline tried to operate such service until this year (assuming that Continental Express is deemed a signatory airline). While Continental had planned to begin Love Field-Houston service in 1985, that service was intrastate service.

The parties take somewhat different positions on this issue than they do on whether Dallas may restrict service at Love Field. Fort Worth and Dallas support the DFW Board's position. Southwest briefly states its agreement with the DFW Board's position that airlines may contractually waive their rights to use Love Field. While American reaffirms its belief that the cities and the DFW Board may restrict service at Love Field and that the DFW use agreements are valid, it contends that, if we find that the cities and the DFW Board may not restrict service at Love Field, American has the right to operate interstate service at Love Field, even though American is a signatory airline. Legend takes no position on the issue. Continental Express argues that the use agreement is unenforceable because it violates the preemption provision (whether Continental's use agreement restricts Continental Express is a separate issue that we are not addressing here).

On the ground that Continental's use agreement prohibited that airline and affiliated airlines from operating interstate service at other airports in the metropolitan area, the state court's ruling on the summary judgment motions held that neither Continental nor Continental Express could operate interstate flights at Love Field; this ruling is consistent with the court's temporary injunction barring Continental Express's proposed flights from Love Field to Cleveland.

The Department stated that it would consider whether a DFW use agreement would block an airline from exercising its certificate authority to operate flights from Love Field that are consistent with the Wright and Shelby Amendments. Whether the DFW Board can enforce the use agreements barring signatory airlines from operating

interstate service at other airports depends on two federal law questions: whether the DFW Board may bar an airline from using a competing airport, and, if not, whether an airline may nonetheless waive its right to use other airports. The Department has determined to rule on these issues in the context of the Love Field dispute.

As an initial matter, the Department does not agree with the DFW Board's argument that the validity of the use agreement clause is a state contract law question. DFW Board Comments at 42. The clause's validity is necessarily a federal law question as well, because federal statutes, such as the preemption provision, bar airports from imposing some types of restrictions on airlines using an airport. A use agreement that violates federal law is invalid, assuming that an airline may waive its federal right to serve any airport.

As a matter of contract law, the use agreement by its terms does not prohibit signatory airlines from using other airports in the Dallas-Fort Worth area. The agreement does not expressly prohibit the airline party from operating interstate service at any other airport in the area. The agreement instead requires airlines to comply with the Bond Ordinance. Section 3.2 of the agreement states, "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth area to, from, and at the Airport, to the extent required by the terms of 1968 Regional Airport Concurrent Bond Ordinance" (DFW Board exhibit 23 is a copy of the relevant part of the use agreement). As discussed above, the Bond Ordinance required airlines to move their services to DFW only to the extent "legally permissible." Since Fort Worth and Dallas do not have the power to prohibit

interstate service at Love Field, the cities' Bond Ordinance cannot stop airlines from using Love Field for interstate service.

If the Bond Ordinance or a DFW use agreement does prohibit a signatory airline's use of a competing airport, the prohibition would be invalid. The DFW Board may not restrict an airline from using a competing airport. The preemption provision, 49 U.S.C. 41713, prohibits state and local governments, including airports operated by state and local governments, from regulating airline rates, routes, and services, except when the state or local government is exercising its legitimate powers as an airport proprietor. As discussed above, Dallas' proprietary powers do not allow it to restrict service at Love Field for DFW's benefit. For the same reasons, the DFW Board may not prohibit or limit an airline's use of a competing airport.[26] Since the cities may not impose regulations prohibiting interstate service at Love Field, the DFW Board may not impose such restrictions by contract. *See, e.g., South-Central Development, Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

The DFW Board, supported by Fort Worth and Dallas, contends nonetheless that the DFW Board may enforce the restriction against the use of a competing airport because the signatory airlines have agreed to the restriction and waived any rights they had to use other airports. We cannot agree with that claim. We think that an airline

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[26] In addition, the use agreement appears to be unlawful because it discriminates against interstate commerce by prohibiting an airline from operating any interstate flights from another area airport while placing no limits on intrastate flights.

may not make an enforceable waiver of its rights to serve whichever airport it wishes to serve in the Dallas-Fort Worth area.[27]

The parties claiming that an airline may waive its right to serve a competing airport have unduly minimized the effect of such a waiver. The DFW Board, after all, essentially seeks to regulate airline service in the area by limiting the markets that airlines may serve. The DFW Board's goal is directly contrary to the policies established by Congress in enacting the Airline Deregulation Act of 1978. Congress did not eliminate the Board's authority to regulate airline routes in order to benefit individual airlines. Congress took that action in order to benefit the public – Congress determined that travellers would obtain the best mix of fares and service if airlines were free to respond to market demands. To give airlines the ability to respond to market forces, Congress ended the Board's authority to determine which airline should serve which route. The DFW Board's use agreement would recreate for that body the ability once held by the

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[27] The Department is ruling on the waiver issue in the context of the Love Field dispute and with respect to a contract clause that strikes at the heart of airline deregulation by giving the DFW Board the power to determine what routes may be operated by airlines serving the metropolitan area. The Department recognizes, as the airport trade associations point out, that airlines and other airport users often waive various rights and that waivers unlike the waiver at issue here may be necessary for an airport's efficient operation. *Cf.* 61 Fed. Reg. 31994, 31998 (June 21, 1996) (policy statement governing airport rates and charges). The ruling on the use agreement clause at issue here is not intended to place in doubt the validity of waivers obtained by airports for legitimate reasons.

Board to limit entry and exit in airline markets. In short, the DFW Board's use agreement would, for airlines in the Dallas-Fort Worth area markets, undo the principal feature of Congress' deregulation of the airline industry. The use agreement's bar against the use of a competing airport thus clearly violates public policy (and, as explained, the statutory preemption provision).

As a result, any airline's waiver of its right to determine which airport to serve would be unenforceable. As the Supreme Court has explained, *Brooklyn Saving Bank v. O'Neil*, 324 U.S. 697, 704-705 (1945) (citations omitted),

> [A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.

See also Restatement, Second, Contracts, section 178.

Indeed, so strong in analogous areas is the policy of eliminating anticompetitive practices that a party to a contract that violates the antitrust laws may ordinarily sue the other party for treble damages for the injury caused the plaintiff by the unlawful provisions. *See, e.g., Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Perma Life Mufflers v. International Parts*, 392 U.S. 134 (1968). Under general contract law principles, moreover, a contract that acts as a restraint of trade may not be enforced against a

party to the contract. Restatement, Second, Contracts, section 186.[28]

In addition, the Department does not see how the public would benefit from allowing the DFW Board to enforce the use agreement clause. If the DFW Board could restrict the use by signatory airlines of other airports, it would frustrate Congress' policies of free entry and exit in airline markets and deny the public the benefit of additional competition and additional airline service options. The DFW Board has not shown that the clause is needed to obtain legitimate airport goals. As shown, the DFW Board has no authority to restrict airline service at other airports in order to maximize DFW's revenues.

The DFW Board points out that airlines can gain access to DFW facilities without signing a use agreement and that a number of non-signatory airlines are serving the airport. However, signatory airlines pay lower fees for the use of DFW facilities. DFW Board Reply at 27. The DFW Board has not shown that the reduced fees charged signatory airlines require an airline commitment to use only DFW for interstate flights. The DFW Board has not shown a justification for the restriction, and airlines may not surrender their right under federal law to use other airports in the metropolitan area.

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[28] Similarly, when we readopted our rules on computer reservations systems ("CRSs") in 1992, we declined to give large travel agencies a waiver from the rules on travel agency CRS contracts, because the restrictions on contracts were primarily intended to promote competition in the CRS business, not to protect travel agencies. 57 Fed. Reg. 43780, 43828 (September 22, 1992).

The parties supporting the enforceability of the DFW use agreements mistakenly rely upon language in *American Airlines v. Wolens*, 513 U.S. 219 (1995), in arguing that the agreements may be enforced by the DFW Board. *Wolens* held that the states were not preempted by 49 U.S.C. 41713(b) from enforcing contract obligations voluntarily accepted by a private party. The Court stated, 513 U.S. at 824:

> We do not read [49 U.S.C. 41713(b)], however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. . . . The [Airline Deregulation Act] . . . was designed to promote 'maximum reliance on competitive market forces.' Market efficiency requires effective means to enforce private agreements. . . . As stated by the United States: 'The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.'

These statements cannot support a conclusion that the DFW Board can enforce a contract barring an airline from using a competing airport. First, the DFW Board is not a private party – it is a local government agency that seeks to enforce requirements allegedly created by the Bond Ordinance. The Bond Ordinance in turn is not a private contract – it is an agreement between two cities, Dallas and Fort Worth. Secondly, the reliance on the statements in *Wolens* is ironic. The Court held that the state courts should be able to enforce private contracts because doing so was essential to achieve Congress' goal of "maximum

reliance on competitive market forces." The parties relying on this language here wish to frustrate competitive market forces by enforcing an agreement which assertedly denies airlines any ability to use an airport competing with DFW, whether or not there is a market for service at that airport.

The quoted statement in *Wolens* in any event is essentially irrelevant. That decision involved a different issue – whether a state court could apply its general contract law principles in enforcing a contract that did not violate federal law or policy. The case did not involve a party's ability to enforce a contract clause that did violate federal law or policy.

ISSUE FIVE: RESTRICTIONS ON THROUGH SERVICE FROM LOVE FIELD

At the request of the DFW Board, the Department agreed to consider an issue generated by Continental Express' flights with aircraft with a passenger capacity of 56 passengers or less between Love Field and Houston, a Continental hub. As noted above, subsection (c) of the Wright Amendment prohibits airlines from offering through service between Love Field and points outside the Love Field service area. After beginning its Love Field-Houston flights, Continental Express has been advertising through service between Love Field and points outside the Love Field service area that are served by Continental from its Houston hub (a copy of such an advertisement is at American Comments at 75).[29]

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[29] Without the ability to offer through service, Continental Express and Continental could carry a passenger from Love

The Department therefore stated that it would rule on whether an airline may offer through service from Love Field to points outside the Love Field service area, when the through service would involve the use of a flight with aircraft with a passenger capacity of 56 passengers or less from Love Field to another point in Texas from which the traveller would fly to his or her destination outside the Love Field service area.

The Department begins this analysis with the predicate that an airline may provide through service to points outside the Love Field service area on Love Field flights operated with aircraft with a passenger capacity of 56 passengers or less. As discussed above, the commuter aircraft exemption is created by subsection (a) of the Wright Amendment. That subsection, unlike subsection (c), the subsection governing flights with large aircraft, contains no prohibition against through service. Thus an airline operating under the commuter aircraft exemption may offer through service to points beyond the endpoint of the Love Field flight, since the statute by its terms does not prohibit it from doing so. Congress' decision to expressly prohibit through service in subsection (c) but

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Field to, for example, Lima, Peru, only by selling the passenger a separate ticket for each leg of the journey (that is, Love Field-Houston and Houston-Lima) and requiring the passenger to pick up any checked luggage in Houston and rechecking it for the Lima flight. In addition, Continental Express and Continental could not volunteer information about the availability of the Love Field-Lima service – the traveller could only obtain information by first asking the airline whether such service was available. *See* Order 85-12-81 at 10-11.

not subsection (a) means that through service is allowed under the commuter aircraft exemption.[30]

Continental Express' Houston flights, however, present a more difficult issue for which the Wright Amendment provides no clear answer. Subsection (a) of the Wright Amendment is limited to interstate flights. Thus the statute could be read to say that any intrastate flights, like the Love Field-Houston flights, would be covered by subsection (c) and hence would be subject to the prohibition against through service. In that case, Continental Express' offering of through service to points beyond Houston that are outside the Love Field service area would be unlawful.

Such a reading of the statute would be less reasonable than an interpretation allowing through service on flights within Texas. Congress enacted the Wright Amendment because of the controversy created by the Board's 1979 grant of Southwest's application for authority to operate an interstate route. Southwest was already operating a significant amount of intrastate service from Love Field. Congress intended to resolve the dispute over Love Field service by defining the categories of interstate service that could and could not be operated. Subsections (a) and (b) of the Wright Amendment thus prohibit all interstate

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[30] Some parties opposing Continental Express' position on this issue claim that it was resolved by our earlier interpretation of the Wright Amendment, which stated that an airline could not offer through service on Love Field flights, Order 85-12-81 at 10-13 That language, however, clearly referred to Love Field flights operated with large aircraft subject to the restrictions of subsection (c).

service except services operated with commuter aircraft and a limited number of charter flights, which are exempt under subsection (a), and interstate services being operated on November 1, 1979, which are exempt under subsection (b). Subsection (c) creates another exception – the exception for flights operated with large aircraft between Love Field and points in Texas and the states bordering on Texas – but does not prohibit any kind of service. As a result, the only express prohibitions are those in subsections (a) and (b), which are limited to interstate service. The Wright Amendment accordingly does not restrict intrastate flights.

Subsection (c) could be read as assuming that an airline that operated intrastate flights from Love Field could not offer through service to points outside the Love Field service area from the endpoint of the Love Field flight, whether the flight ended at another Texas city or at a city within one of the four states bordering on Texas. In our view, the prohibition against through service in that subparagraph forms one of the conditions under which Congress was willing to allow some interstate service with large aircraft at Love Field. Congress authorized such interstate service on the condition, among others, that the airline did not offer through service to points beyond the Love Field service area.

There is no reason, moreover, why Congress would have intended to prohibit through service on flights operated with aircraft with a passenger capacity of 56 passengers or less to points within Texas but not on flights operated with such aircraft to points outside Texas. Furthermore, the Shelby Amendment demonstrates that Congress is

less interested in limiting Love Field to short-haul service, when the Love Field flight is operated with aircraft with a passenger capacity of 56 passengers or less. As shown above, the Shelby Amendment allows large aircraft to be used under the commuter aircraft exemption, if reconfigured to have a passenger capacity of 56 passengers or less. Congress' willingness to allow large aircraft to operate longhaul service under the commuter aircraft exemption suggests that a reading of the statute allowing through service over a connecting point in Texas would be consistent with Congress' intent.

Although Southwest claims that an interpretation allowing airlines operating Love Field flights with aircraft with a passenger capacity of 56 passengers or less to offer through service will discriminate against it, since it operates only large aircraft, that result stems from Southwest's operational decisions. Southwest has chosen to use only one type of aircraft, which is configured to hold more than 56 seats. Our interpretation will allow Southwest to offer through service from Love Field if it chooses to use smaller aircraft. Thus any discrimination stems from Southwest's own decisions, not from our interpretation of what Congress enacted. *Cf.* Order 85-12-81 at 10.

ACCORDINGLY:

1. The Department holds that (i) the City of Fort Worth may not enforce any commitment by the City of Dallas under the Bond Ordinance or other agreement to limit operations at Love Field authorized by federal law, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law; (ii) the ability of the City of Dallas to limit the type

of airline service operated at Love Field is preempted by the Wright and Shelby Amendments; (iii) any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds may operate service with any type of equipment and flights of any length from or to Love Field, notwithstanding any claim that such service violates any agreement between the Cities of Dallas and Fort Worth; (iv) the Dallas-Fort Worth International Airport Board may not enforce any contract provision that allegedly bars an airline from operating interstate airline service at another airport in the Dallas-Fort Worth metropolitan area; and (v) any airline may offer through service between Love Field and any other point to passengers using a flight between Love Field and another point within Texas operated under subsection (a) of the Wright Amendment, as amended by the Shelby Amendment;

2. The Department grants the motions by the City of Fort Worth and Legend Airlines to supplement the record; and

3. The Department grants the motions for leave to file surreplies and other unauthorized documents.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
And International Affairs

(SEAL)

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APPENDIX C

Order 98-12-28

(LOGO)

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 22nd day of December, 1998
Served December 23, 1998

LOVE FIELD SERVICE INTERPRETATION PROCEEDING	Docket OST-98-4363

ORDER ON PROCEDURAL MOTIONS

The Department began this proceeding to issue interpretations on several federal law issues raised by the current dispute over whether airlines may operate the additional services at Dallas' Love Field authorized by legislation enacted by Congress in 1997, Section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L. No. 105-56, 111 Stat. 1425, 1447 (October 27, 1997) ("the Shelby Amendment"). Order 98-8-29 (August 25, 1998). This Department, including the Federal Aviation Administration ("FAA"), is responsible for administering the relevant statutes. The Department undertook a similar proceeding to interpret the statutory restrictions on Love Field service imposed by Section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980) ("the

Wright Amendment"). *Love Field Amendment Proceeding*, Order 85-12-81 (December 31, 1985), *aff'd, Continental Air Lines v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988).

The Department is simultaneously issuing an order that addresses those legal issues. The parties' pleadings, however, raised a number of procedural issues that are addressed in this order. This order denies the requests by Fort Worth, American Airlines, and the DFW Board for the dismissal of this proceeding. The Department also finds that Fort Worth's allegations of bias and *ex parte* contacts by Department officials and staff members have no factual basis.

FACTUAL AND LEGAL BACKGROUND

The companion order sets forth in detail the factual and legal background to the current dispute over additional Love Field service. This order provides the background information relevant to the parties' procedural requests.

State Court Litigation

The current dispute between the parties has resulted in litigation in both the federal and state courts in Texas. Fort Worth initiated the state court proceeding by filing a suit against Dallas, Legend, and others to block additional service at Love Field. *City of Fort Worth, Texas v. City of Dallas, Texas, et al.*, Tarrant County District Ct. No. 48-171109-97 (filed October 10, 1997). American Airlines and the DFW Board have intervened in that case to support Fort Worth's position. Fort Worth argues that Dallas is required by their agreement, set forth in their

1968 Regional Airport Concurrent Bond Ordinance ("the Bond Ordinance"), to bar airlines from operating any service not authorized by the Wright Amendment. Dallas, Continental Express, and Legend have contended that airlines may operate the additional services authorized by the Shelby Amendment and that Fort Worth has no right to compel Dallas to deny airlines the ability to use Love Field for such services.

On July 9, 1998, the state court enjoined Continental Express from operating Love Field-Cleveland flights pending the court's final decision.

On October 15 the state court granted the summary judgment motions filed by Fort Worth, American, and the DFW Board against Dallas, Continental Express, and Legend. The court found that Dallas was obligated by the Bond Ordinance (as amended by the Wright Amendment) to bar airlines from operating services permitted by the Shelby Amendment and that federal law did not override the cities' agreement restricting Love Field service.

Continental Express initially appealed the grant of the temporary injunction but withdrew the appeal after the trial court issued its decision on the summary judgment motions. Continental Express and Legend have publicly stated that they will appeal that decision.

As explained in more detail below, the state court litigation (and the related federal court litigation described below) caused most of the parties in the dispute – Fort Worth, American, Dallas, Legend, and Continental Express – to meet with Department officials, including FAA officials, to discuss the dispute and to ask for our assistance before we began this proceeding.

In addition, on the eve of the state court's hearing on the temporary injunction requests, Continental Express asked the Department whether it could issue a statement of its position on certain issues that were likely to be relevant at the hearing. On June 30, Nancy E. McFadden, the Department's General Counsel, provided Continental Express a letter restating the Department's position on two factual issues, while declining to give a ruling on two legal issues, since the Department had not previously issued a ruling on the latter issues (a copy of her letter is in the docket for this proceeding).

Federal Court Litigation

After Fort Worth sued Dallas in state court, Dallas filed a federal court suit against this Department and Fort Worth to obtain a declaratory judgment that Dallas may not bar airlines from operating service authorized by the Shelby Amendment. *City of Dallas, Texas v. Department of Transportation et al.*, N.D. Tex. No. 3-97CV-2734-T (filed November 6, 1997). The federal court has consolidated that case with a similar case filed by Continental Airlines and Continental Express, *Continental Airlines and Continental Express v. City of Dallas and City of Fort Worth*, N.D. Tex. No. 398CV1187-R (filed May 19, 1998).

Related Administrative Proceedings

Legend has filed an application for certificate authority under 49 U.S.C. 41102 so that it may begin airline operations, Docket OST-98-3667. Fort Worth is opposing Legend's application in part on the ground that Legend's

proposed service – longhaul flights from Love Field operated with large aircraft reconfigured to hold no more than 56 seats – would allegedly violate the Wright Amendment. Fort Worth Answer at 13-17, Docket OST-98-3667. Fort Worth urged the Department to delay ruling on Legend's application until the state court had decided whether Legend's proposed service would be lawful. *Id.* at 21-22. American filed an answer concurring with Fort Worth's position.

The Department has issued a show-cause order tentatively finding that Legend meets the statutory requirements for obtaining certificate authority. Order 98-10-15 (October 16, 1998). The Department stated that it would consider in this proceeding the arguments about Legend's ability to carry out its service proposal, if it does not grant Fort Worth's motion to dismiss. *Id.* at 4-5.

Finally, the FAA began an enforcement proceeding against Centennial Airport, an airport near Denver, which has imposed operating restrictions analogous to the ones that Fort Worth wishes to impose on Love Field. The FAA has issued a Director's Determination, a preliminary decision, holding that the Arapahoe County Public Airport Authority, the airport's owner, has violated its obligations under federal law. *Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority*, FAA Docket Nos. 16-98-05 *et al.*, Director's Determination (issued August 21, 1998) ("Centennial Decision") (exhibit 17 in the DFW Board's comments is a copy of this FAA decision). After the Director's Determination was issued, an FAA hearing officer held a hearing in the case as provided by 14 C.F.R. Part 16.

THE PARTIES' COMMENTS AND MOTIONS

The dispute over new service at Love Field led the Department to institute this proceeding, as explained in Order 98-8-29. The requests by most of the parties in the litigation for the Department's assistance and the importance of the issues caused the Department to conclude that it should issue an interpretation of the the [sic] relevant federal statutes. Order 98-8-29 (August 25, 1998). As noted in that order, this Department, including the FAA, is responsible for administering the relevant statutes. Moreover, the Department had held a similar proceeding in 1985 in order to resolve other disputes over the interpretation of the Wright Amendment. Order 98-8-29 at 1, 3, citing *Love Field Amendment Proceeding*, Order 85-12-81 (December 31, 1985), *affirmed, Continental Air Lines v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988). In this instance the Department stated its intent to issue a ruling that the courts could consider. Order 98-8-29 at 5.

After the proceeding began, Fort Worth filed requests to dismiss this proceeding and for disclosure of the circumstances surrounding the General Counsel's letter to Continental Express. The Department stated that it would defer ruling on those requests until it had reviewed the parties' comments and reply comments. Order 98-9-5 at 2-4.

In their comments on the merits, Fort Worth, American, and the DFW Board essentially argue that federal law allows Dallas as Love Field's proprietor to restrict services at that airport permitted by the Wright and Shelby Amendments. They also argue that the Department should not issue any ruling on federal law issues relevant

to the Love Field dispute. They additionally ask the Department to hold an oral argument before deciding this proceeding.

Fort Worth renews its request for disclosure and asserts that discovery in the state court case has shown that Department officials and staff members had contacts about the case with parties other than Fort Worth, which allegedly indicates bias and unlawful *ex parte* communications. No other party has supported these assertions by Fort Worth.

The DFW Board also requests the Department to mediate the dispute over Love Field service and to suspend this proceeding during mediation.

Dallas, Southwest, Continental Express, and Legend contend that the Department may and should issue a decision on the federal law issues. These parties assert that Dallas may not bar airlines from operating the Love Field services authorized by the Wright and Shelby Amendments.

Legend and Continental Express contend that Fort Worth's requests for further disclosure are without merit. Legend notes, among other things, that American had several contacts with Department officials and staff members before the Department began this proceeding. Legend contends that under established administrative law principles all such contacts were proper, since the prohibition against *ex parte* communications does not apply before a proceeding has begun.

Dallas and Legend oppose the request for oral argument. Dallas, Continental Express, Southwest, and Legend oppose the DFW Board's request for mediation.

SUMMARY OF THE DEPARTMENT'S PROCEDURAL DECISIONS

Since the Department has the responsibility to administer the federal statutes relevant to the Love Field dispute, the Department has concluded that it should publish a decision interpreting the relevant federal statutes. The Department is therefore denying Fort Worth's request to dismiss this proceeding.

The Department is denying Fort Worth's request for disclosure – Fort Worth has cited nothing suggesting any bias or improper conduct by Department officials and staff members, and the courts have refused to require the type of disclosure sought by Fort Worth except in rare cases where, unlike here, there is clear evidence of agency misconduct. *See, e.g., Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). The conduct cited by Fort Worth violated no statute or Department rule and created no unfairness for Fort Worth. The Department is also denying the requests for oral argument, for no party has shown that an oral argument is necessary or would be useful in this proceeding.

THE DEPARTMENT'S JURISDICTION

The Department's authority to issue a ruling interpreting the federal laws applicable to Love Field is firmly established. The relevant statutes are statutes that we are responsible for administering and enforcing. As the

Supreme Court stated, "The Secretary of Transportation is charged with administering the federal aviation laws. . . . " *Northwest Airlines v. County of Kent*, 510 U.S. 355, 366-367 (1994). *See also New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 172 (1st Cir. 1989). The dispute over Love Field service, moreover, raises substantial federal issues that this Department should address, in particular, the ability of a local airport owner to restrict service at a second airport to improve the competitive position of the first airport. The Administrative Procedure Act authorizes the Department to issue declaratory orders such as this. 5 U.S.C. 554(e). *See, e.g., British Caledonian Airways v. CAB*, 584 F.2d 982 (D.C. Cir. 1978).

The Department is specifically responsible for enforcing the Wright Amendment (and thus the Shelby Amendment, which amends the Wright Amendment), as the Fifth Circuit has stated. *Cramer v. Skinner*, 931 F.2d 1020, 1024 (5th Cir. 1991), *cert. denied*, 502 U.S. 907. As noted above, the Department has already issued one order interpreting the Wright Amendment, Order 85-12-81 (December 31, 1985). The Department's General Counsel and Deputy General Counsel have also written opinions interpreting that statute. *See* September 16, 1996, letter from Nancy E. McFadden, the Department's General Counsel, to Dalfort Aviation, and May 16, 1994, letter from Rosalind A. Knapp, the Department's Deputy General Counsel, to Centennial Express.

In affirming our order interpreting the Wright Amendment, the Court of Appeals held that our interpretation of that statute was entitled to deference, a holding which necessarily assumes that the Department is the agency

responsible for administering the restrictions. *Continental Air Lines v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988). Any doubt about our responsibility for administering the Wright Amendment was resolved in a case challenging the constitutionality of that statute, *State of Kansas v. United States*, 16 F.3d 436 (D.C. Cir. 1994). There the Court of Appeals specifically acknowledged that this Department "administers the statute." 16 F.3d at 438.

Similarly, when the Texas Court of Appeals ruled on Continental's efforts to begin Love Field-Houston service over ten years ago, it relied in part on the Department's determination that Continental's proposed service would be intrastate service. *City of Dallas v. Continental Airlines*, 735 S.W. 2d 496, 503 (Tex. Ct. App. 1987).

The other statute interpreted in this proceeding is the preemption provision, including the exception for airport proprietor's rights, 49 U.S.C. 41713(b), which was added to the Federal Aviation Act by the Airline Deregulation Act of 1978. The Secretary is responsible for enforcing the Federal Aviation Act, now Part A of Subtitle VII of Title 49 of the U.S. Code, including the preemption provision. The statute thus provides, "On the initiative of the Secretary of Transportation . . . , the Secretary . . . may conduct an investigation, if a reasonable ground appears to the Secretary . . . for the investigation, about . . . any question that may arise under this part." 49 U.S.C. 46101(a)(2). The statute additionally authorizes the Secretary to "take action the Secretary considers necessary to carry out this part, including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders." 49 U.S.C. 40113(a). As part of its responsibility

for administering the Act's economic regulatory provisions, the Board issued a policy statement defining the kinds of state regulation that were preempted by 49 U.S.C. 41713(b). 14 C.F.R. 399.100, adopted by 44 Fed. Reg. 9948 (February 15, 1979).

The Supreme Court has expressly recognized that this Department is responsible for administering and interpreting the preemption provision. In *Wolens v. American Airlines*, 513 U.S. 219 (1995), the Court described this Department as "the superintending agency" for the preemption provision, 513 U.S. at 229, n. 6, and upheld the statutory interpretation urged by the United States, in part because the interpretation had the approval of the statute's "experienced administrator," the Department of Transportation, 513 U.S. at 234. The lower courts have also recognized this Department's responsibility for administering the preemption provision. In *New England Legal Foundation, supra*, the First Circuit held that the district court should have deferred its ruling on whether an airport fee violated the preemption provision until we had issued a decision on the issue. 883 F.2d at 173. And the scope of the airport owner's proprietary rights is one of the issues that the FAA necessarily addressed in its Centennial Decision. Centennial Decision at 27-31.[1]

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[1] To support their position that the Department should not decide the preemption issue, Fort Worth, the DFW Board, and American have cited a brief filed by this Department with the Board in one of the Board's Love Field proceedings. The brief asserted that the Board had no responsibility for administering that statutory provision. *See, e.g.*, Fort Worth Comments at 15. Whether the brief's description of the Board's role was accurate, the cited statement does not accurately characterize the

The Department also finds that it has the responsibility to use this authority to issue an order interpreting the federal statutes relevant to the Love Field dispute. The dispute largely involves the meaning of those statutes. Given its responsibilities for administering those statutes, the Department should assist. the parties by issuing its interpretation. The Court of Appeals approved our taking similar action in 1988. Moreover, the Department is a party in the pending federal court suit and presumably will have to state its position there. That likelihood further supports the Department's determination that it should issue this order, where the Department can determine the proper interpretation after giving the parties the opportunity to present their arguments.

The Department's dismissal of this proceeding would create a dilemma for Dallas. Dallas as Love Field's owner must comply with the applicable federal statutes. Dallas is understandably concerned that the Department's interpretation of the applicable laws could be inconsistent with the state court's decision. As the city explains, "Dallas strongly wishes to avoid a situation in which it is first forced to comply with a state court judgment directing it to impose a perimeter rule and later found by the Department to be violating its grant assurances or federal law by imposing that same rule." Dallas Reply at 8. The Texas state court proceeding will not prevent us from taking enforcement action against Dallas, because the

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Department's responsibilities, as is apparent from the statute itself; the Supreme Court's decision in *Wolens;* the Department's decision in the Massport case, affirmed in *New England Legal Foundation;* and the FAA's Centennial Decision.

Department is not a party to that proceeding and will not be bound by the decision. The Department's issuance of its interpretation will reduce Dallas' risk of being required to comply with inconsistent decisions, since the Texas appellate courts will be able to consider the Department's interpretation. For these reasons, Dallas urges the Department to issue a ruling interpreting the federal statutes.

In arguing that the Department should nonetheless dismiss this proceeding, Fort Worth and American contend that the Texas courts can decide the relevant issues and should be allowed to do so. The Department agrees that the Texas courts could decide the federal statutory issues raised by the Love Field dispute without any interpretation being issued by it. However, the better course is for the Department to issue its own interpretation of the applicable statutes, which it administers and can enforce against Dallas as Love Field's owner. Fort Worth and American, moreover, never explain why the Department should dismiss this proceeding and thereby increase Dallas' risk of being subject later to conflicting orders from us and the state courts.[2]

Furthermore, as noted above, Fort Worth and American have contended in Docket OST-98-3667 that the Department may not grant Legend's application for certificate

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[2] Fort Worth's supplemental motion to dismiss, filed December 1, mistakenly assumes that the state courts could issue a final decision on the dispute that would avoid other litigation. Since the state courts' decision would not bind the Department, their decision would not finally resolve the dispute.

authority because Legend's service proposal allegedly violates the Wright and Shelby Amendments. The Department has the responsibility for determining whether Legend's application satisfies the statutory standards for certification. The existence of these issues in the Legend certificate proceeding thus further supports the Department's decision to rule on the federal law issues here.

American and Fort Worth err by asserting that the pendency of the state court case precludes the Department from issuing a ruling on the federal law issues. They wrongly claim that the Anti-Injunction Act, 28 U.S.C. 2283, prohibits the Department from issuing this order while the state court proceeding is pending. The Anti-Injunction Act bars federal courts from stopping state court proceedings (with some exceptions) but does not restrict federal agencies. The existence of a state court suit does not bar a federal agency from carrying out its responsibilities. In *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), the Supreme Court declared, "The purpose of [the Anti-Injunction Act] was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." 404 U.S. at 146.

The state court itself, moreover, has not opposed this proceeding. And the federal district court in Dallas will probably be deciding a case involving the same issues, despite the existence of the state court proceeding.

In addition, the Department has decided other cases where a related case was pending in a federal court. For

example, the First Circuit affirmed the Department's decision on Massport's fees, reversed the district court's contrary decision, and held that the district court should have delayed deciding its case until the Department issued its decision. *New England Legal Foundation*, 883 F.2d at 173.[3] *Cf. Alaska Airlines et al., Wien Acquisition*, 82 CAB 1636, 1651 (1979).[4]

The Department disagrees with American's complaint that its ruling will increase rather than decrease the amount of litigation. In any event the Department as the administrator of the statutes has the responsibility to issue its interpretation of their meaning.

Finally, the Department does not agree with the suggestions by Fort Worth and American that, instead of issuing

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[3] Fort Worth and American contend that the First Circuit's decision is not relevant, since one basis for the court's decision was the existence of complex factual issues involving airport rates. The dispute here, in contrast, appears to involve no complex factual issues. *See, e.g.*, Fort Worth Reply at 3. The First Circuit, however, noted that the Massport fee dispute involved no factual disputes and based its decision in part on Congress' decision to make the Secretary responsible for administering federal aviation laws. *New England Legal Foundation*, 883 F.2d at 167, 172-173.

[4] The parties argue over whether the doctrine of primary jurisdiction applies to the federal law issues raised by the Love Field dispute. *See, e.g.*, Fort Worth Comments at 13-18; Continental Express Reply at 20-23. The issue is not relevant here, since the Department is not considering whether the state courts must suspend their proceedings on primary jurisdiction grounds.

this order, it should present its views by either intervening or participating as an *amicus* in the state court proceedings. *See, e.g.,* Fort Worth Motion to Dismiss at 9; American Comments at 80-82. The Department has the responsibility for administering the federal statutes and resolving the issues raised in the Legend certification case. Congress has entrusted the Department with the task of ensuring that airports and their owners comply with the requirements established by statute to achieve Congress' policy goals.

BACKGROUND TO FORT WORTH'S REQUEST FOR DISCLOSURE

Fort Worth suggests that the Department's staff may be biased and may have engaged in improper *ex parte* communications. It bases these suggestions on the contacts between Department officials and staff members, on the one hand, and several of the parties and on the General Counsel's letter to Continental Express. Fort Worth has used these allegations of possible bias and *ex parte* communications to demand that the Department disclose information regarding the General Counsel's letter to Continental Express and related matters.

Fort Worth, however, has not asked that any official or staff member of the Department be recused from this proceeding. No other party has supported Fort Worth's suggestions of possible bias and improper conduct. Fort Worth itself has not tried to show that any specific communication has prejudiced it, even though the state court discovery process has enabled Fort Worth to learn what

the other parties told Department officials and staff members.[5]

The Department rejects Fort Worth's insinuations of improper conduct. Fort Worth has provided no factual or legal support for its allegations of improper conduct. Among other things, Fort Worth ignores the many contacts that its ally, American, has had with Department officials and staff members on Love Field issues and Fort Worth's own meeting with Department officials and staff members.

This order will first describe the contacts with the parties and the letter given Continental Express and then show why Fort Worth's allegations are entirely unsupported and that these actions were proper.

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[5] The state court allowed Fort Worth and other parties to conduct discovery into the parties' contacts with the Department on Love Field issues. Fort Worth has filed copies of interrogatory answers and deposition transcripts discussing the other parties' contacts that it obtained by discovery. In response, Legend filed similar documentation on the contacts by Fort Worth and American. Legend, however, contends that the contacts with the parties were proper. The Department believes that no federal court would have permitted the type of discovery authorized by the state court, since Fort Worth has failed to show any likelihood of bias or *ex parte* communications. *See, e.g., Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994); *United States v. Morgan*, 313 U.S. 409, 422 (1941). The state court discovery, however, has demonstrated that Fort Worth's allegations are baseless.

Department Contacts with the Parties

As discussed above, after the litigation began in the courts in Texas, most of the parties in the dispute, including American and Fort Worth, met with Department officials and staff members to urge the Department to take some action to help resolve the dispute. Some of these parties, primarily American and Legend, also sent letters and discussed the state court proceedings in telephone conversations with Department officials and staff members.

On May 6, 1998, Fort Worth's mayor and other Fort Worth representatives met with Department officials and staff members to ask the Department to mediate the dispute. Before the Department began this proceeding, American urged it in several meetings and telephone conversations with Department officials to take no action and to allow the state courts to resolve the dispute. American also argued that additional Love Field service would be harmful and unlawful. Legend Reply at 46-49; Legend Motion to Supplement the Record.

Dallas and Legend, on the other hand, urged the Department to intervene in the state court proceeding; if the Department was unwilling to do that, they suggested that it should issue a ruling interpreting the relevant federal statutes. They arged [sic] that the Department should intervene because the litigation involved important federal legal and policy questions that might be wrongly decided by the state courts if they were not given the Department's position on those issues. These meetings included a discussion of the relevant legal issues, since they necessarily wanted to show that their position on the

legal issues was correct and that Fort Worth's position was incorrect. Legend also sent several letters urging the Department's intervention in the state court proceeding.

In all of these meetings and conversations, Department officials and staff members listened to the views of the parties but made no commitment and expressed no view on the legal issues.[6] After this proceeding began, Legend wrote a letter intended to cause the Department to intervene in the state court proceeding; the letter did not discuss the merits of this proceeding. McArtor Deposition at 246-247, attached to October 19 Fort Worth Motion to Supplement the Record.

Department staff members and officials have had several contacts with Continental Express, primarily after this proceeding began, but those contacts resulted from Fort Worth's efforts to suggest that the opinion given Continental Express demonstrated improper favoritism. The Department staff members discussed the litigation with Continental Express to confirm that Fort Worth's allegation had no factual support whatever. Cox Answers to Deposition at 15-17, attached to October 21 Fort Worth

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[6] Officials from both Continental Express and Legend have testified, for example, that they had no knowledge of the Department's intent to hold this proceeding until it published the order beginning the proceeding. Cox Answers to Deposition at 16, 22, attached to October 21 Fort Worth Motion to Supplement the Record; McArtor Deposition at 49-50, 55, 86, attached to October 19 Fort Worth Motion to Supplement the Record. American's suggestion, American Reply at 4, that the Department may have given some parties advance notice of its decision to conduct this proceeding is incorrect, for it told none of the parties.

Motion to Supplement the Record. Legend also informed Department officials of the allegations made by Fort Worth in the state court proceeding. These communications did not involve any discussion of the merits of this proceeding.

American has also had some contacts with Department officials and staff members after this proceeding began, primarily to discuss the charges made by Fort Worth in the state court proceeding. The DFW Board asked Department officials on numerous occasions to mediate the dispute, a request made later by a motion filed in the docket. Legend Motion to Supplement the Record.

Before this proceeding began, the Department received letters from Senator Trent Lott, the Majority Leader of the United States Senate, and Congressman Bud Shuster, the Chairman of the Committee on Transportation and Infrastructure of the United States House of Representatives, asking the Department to take action to assert the federal interests involved in the dispute. After the proceeding began, the Department received letters supporting Fort Worth's position from Senator Kay Bailey Hutchison and Congresswoman Kay Granger and status inquiries from Senator Lott, Congressman Martin Frost, and the staff of the Senate Appropriations Committee.

The General Counsel's Letter to Continental Express

On June 30, as noted, Nancy E. McFadden, the Department's General Counsel, sent Continental Express a letter discussing several issues relevant to the state court's hearing on the motions to enjoin Continental Express' proposed Love Field-Cleveland flights (we have placed a

copy of her letter in the docket for this proceeding). This proceeding began eight weeks later, on August 25.

Continental Express had asked the Department whether it could issue a statement of its position on certain issues that were likely to be relevant at the hearing. The June 30 letter responded in part to the airline's request. Continental Express had asked her for the Department's position on four issues. Two of the issues were whether additional service at Love Field would decrease safety or threaten the viability of DFW. The General Counsel set forth the Department's earlier findings on those two issues. The other two issues were legal questions: whether Dallas could restrict service at Love Field to carry out its agreement with Fort Worth and whether the Wright and Shelby Amendments allow airlines to operate longhaul service at Love Field with regional jets. The letter stated that the Department had not specifically addressed those issues and expressed no opinion on them. It noted, however, that the earlier rulings on the proposals by Centennial Express and Dalfort had suggested that an airline could use aircraft with a passenger capacity of 56 passengers or less of any type to provide longhaul service from Love Field and that the Shelby Amendment had overturned her opinion that reconfigured large aircraft could not be used to provide longhaul service.

THE DEPARTMENT'S CONDUCT WAS PROPER

Neither the sending of the letter to Continental Express nor the contacts with the parties were improper. Fort Worth, despite its extensive discovery efforts, cites no facts indicating that any *ex parte* communications

occurred (that is, communications occurring after the Department began this proceeding that discussed the merits of the federal law issues being considered here), that any Department official or staff member is biased, or that Fort Worth's due process rights have in any way been violated. Fort Worth has failed to explain how any statute, regulation, or judicial decision supports its claims.

Fort Worth's request, moreover, on its face is extraordinary – Fort Worth essentially assumes that any contact with the parties opposing Fort Worth was improper, while any contact with Fort Worth and American is proper. In addition, the General Counsel's letter expressly refused to state an opinion on the legal issues being considered in this proceeding.

The various contacts with the parties on the dispute created no unfairness. As explained, Department officials and staff members met with most of the parties in the litigation. Fort Worth has never tried to explain why it would be unfair for the Department to meet with the parties opposed to its position when Fort Worth itself met privately with Department officials and staff members.[7] In any event, virtually all of the meetings with the parties

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[7] One of the Legend communications cited by Fort Worth as an alleged *ex parte* communication is a fax to a Department official referring to the Department's agreement to give Legend copies of materials given the Department by Fort Worth, American, and the DFW Board. December 9, 1997, fax from Edward Faberman, attached to October 13 Fort Worth Motion to Supplement the Record.

occurred before this proceeding was begun. Those meetings did not involve any *ex parte* communications, for both the Administrative Procedure Act's *ex parte* rules and our *ex parte* rules do not restrict communications occurring before the beginning of the administrative proceeding. 5 U.S.C. 557(d)(1)(E); 14 C.F.R. 300.2. Fort Worth has cited no evidence that any communication occurring after we began this proceeding discussed the merits of the federal law issues being considered here or that the earlier communications have prejudiced its ability to present its case.

The discussions of the state and federal court litigation were proper. The Department has been a defendant in a federal court suit on Love Field issues, and several of the parties in the state court suit thought the Department should intervene in that proceeding to protect the federal interests at stake. Discussions focused on whether and why the Department should participate in the litigation are proper. Government agencies are often asked by parties in court proceedings to participate in order to present the United States' position. No court has ever held that such contacts prejudiced related administrative proceedings. The Department, moreover, declined to intervene in the state court proceeding.

Fort Worth has cited no evidence, despite its extensive discovery efforts, indicating that Continental Express or Legend actually tried to influence the outcome of this proceeding. The communications that occurred after this proceeding began primarily involved matters raised in the state court litigation (principally Fort Worth's charges of bias) and included no discussion of the issues in this

proceeding. Legend's communications similarly represented renewed efforts to persuade the Department to intervene in the state court proceeding. McArtor Deposition, Exhibit 7, attached to October 19 Fort Worth Motion to Supplement the Record.

In addition, Fort Worth's position on the issue of the contacts is contrary to its position on how the Department should best state its position on the legal issues. Fort Worth asserts that, if the Department should take a position on the issues at all, it should do so by filing a brief stating that position in the state court proceedings. Fort Worth Motion to Dismiss at 9. If the Department had followed that course, the Department could have developed its litigation position in private consultations with parties and given no party a right to formally present its arguments to the Department. This proceeding, on the other hand, has given all parties a formal opportunity to present their arguments.

The Department is basing its decision on the legal issues on the pleadings filed in this proceeding, not on any information given it by a party outside the formal record. The courts will review this decision, moreover, on the basis of the analysis in this order and the record in this proceeding.

The General Counsel's letter to Continental Express was not improper. The letter on its face cannot support any claim of bias since she specifically declined to rule on legal issues that had not been previously resolved by the Department. Fort Worth itself has not objected in this proceeding to any of the statements made in the letter. The General Counsel's letter accurately presented the

Department's position on the issues discussed in it. The Department staff attorney most familiar with Love Field issues drafted the letter, and the only revisions to the text of his draft were made by several Department officials and staff members who reviewed the draft.

Continental Express had requested the letter, since it thought that the state court could otherwise be unaware of the Department's position on several relevant issues. The importance of the issues reasonably caused the General Counsel to believe that providing a statement of the Department's position, to the extent that the Department had established a position, would assist the court. Accordingly, the letter was sent in a timely fashion.

Even if the General Counsel's letter were read as stating a position on issues relevant to this proceeding, that would not make this proceeding unfair. The Supreme Court has held that a statement of views on an issue by an agency member does not require the member's disqualification in an adjudicatory proceeding. *FTC v. Cement Institute*, 333 U.S. 683, 700-703 (1948). Staff officials are equally entitled to hold policy views. *Texas Int'l-Pan American-National Acquisition Cases*, 80 CAB 324, 337 (1979). *See also National Airlines, re Board Employee Testimony*, 82 CAB 160 (1979). The courts have similarly held that an agency may fairly decide a proceeding even if the agency initially began the proceeding due to its determination that there was a likelihood of unlawful conduct by the respondent or if the agency had sought a preliminary injunction against the respondent pending completion of the agency proceeding. *Withrow v. Larkin*, 421 U.S. 35 (1975); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1174 (D.C. Cir. 1998).

We note that as well that Fort Worth suggested in the state court proceeding that the General Counsel agreed to respond to Continental Express' request because of past connections between the General Counsel and a lawfirm that allegedly represented the airline. There is no basis for Fort Worth's suggestion. The lawfirm was not involved in the matter and never discussed the opinion request with the General Counsel. The record compiled as a result of the state court discovery demonstrates that the firm never contacted the Department on this proceeding.

Statements That the Department, Dallas, and Legend Had Common Interests

In an apparent effort to limit discovery by Fort Worth in the state court proceeding, Legend and Dallas each objected to several of its discovery requests on the basis that this Department and Legend or Dallas had common interests under Texas law. American and Fort Worth suggest that Legend's statement puts in question our impartiality. Fort Worth Request for Limited Hearing; American Surreply at 4, n. 1.

The Department disagrees. Whatever action was taken by Legend and Dallas was taken without its authorization and without any commitment that it would agree with their position on the issues. Thus far the Department has taken no position on the merits in the district court suit filed by Dallas against it and Fort Worth and has made no promises to Legend or Dallas on what position it may ultimately take.

Denial of Requests for Disclosure and Abatement. Fort Worth has asked the Department to disclose various

matters related to the opinion given Continental Express and to hold a limited hearing to investigate the alleged *ex parte* communications. Since Fort Worth has completely failed to substantiate its charges of unfairness, the Department will deny these requests. Due to its failure to show any indication of improper conduct, it has no right to investigate the Department's decisionmaking processes. As stated in *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994), "Requiring an agency to produce such internal materials and allowing litigants to depose agency officials about such matters would be warranted only in the rarest of cases." *See also United States v. Morgan*, 313 U.S. 409, 422 (1941). This is clearly not a case where a party is entitled to disclosure of the Department's procedures and decisionmaking.

Furthermore, the state court has already allowed Fort Worth to pursue these matters by discovery. Fort Worth has failed to explain why it needs any additional opportunity to investigate the issue.

Fort Worth also asked the Department to abate this proceeding until it conducts more discovery in the state court case. The Department sees no need to delay its decision on that ground. Fort Worth has provided no evidence of bias or improper conduct. There is therefore no reason to delay this proceeding. Fort Worth in any event has conducted additional discovery and still failed to find evidence supporting its allegations of improper conduct.

ORAL ARGUMENT

The DFW Board filed a motion for oral argument four days after the deadline for reply comments. The DFW Board asserts that the issues being considered here are the kind of issues often considered by the courts of appeals, that the courts of appeals normally decide such issues only after holding an oral argument, and that the Department should therefore hold an oral argument. American requested an oral argument in its reply comments. American Reply at 28. Fort Worth later filed its own motion for oral argument.

The Department denies these requests. Parties have no due process right to an oral argument. *FCC v. WJR, The Goodwill Station*, 337 U.S. 265 (1949). The Administrative Procedure Act does not require oral arguments in agency proceedings. The Department rarely hold [sic] oral arguments. No one has shown that an oral argument in this proceeding would be useful or necessary. Moreover, no one claims that it cannot adequately present its arguments in their written comments and reply comments. Scheduling an oral argument would also delay the issuance of a decision.

The Department is unpersuaded by the DFW Board's citation of its intent to hold

an oral argument before issuing a decision on the application by American and British Airways for approval and antitrust immunity for their proposed alliance. The Department stated that that case was "an exceptional case" that involved difficult factual issues and "an enormous degree of regulatory complexity." Order 97-9-4 (September 5, 1997) at 16-17. The Department does not

believe that this case raises issues requiring an oral argument.

MEDIATION

The DFW Board has asked the Department to act as mediators to settle the dispute. The DFW Board also asks that the Department suspend this proceeding during the mediation process. Dallas, Southwest, Continental Express, and Legend oppose this suggestion. They assert that the DFW Board is trying to delay the issuance of a ruling on the federal law issues. While mediation could be desirable later, successful negotiations would be unlikely without the issuance of the Department's interpretation of the federal statutes. Dallas additionally suggests that the Department could not appropriately act as a mediator when it may later issue an order on the legal issues presented in this proceeding.

The Department encourages the parties to settle the dispute privately. A settlement acceptable to all of the parties would be the best outcome. The parties' current positions are far apart, and the state court's efforts at mediation were unsuccessful. Since the state court has already established a mediation process, there is a forum for settlement efforts if the parties consider further discussions worthwhile.

OTHER PROCEDURAL ISSUES

The Department determined to issue a decision promptly in this proceeding. It noted that the state and federal courts were moving toward deciding the cases next year.

Order 98-8-29 at 5. In fact, on October 15 the state court issued its decision on the summary judgment motions. The Department set a procedural schedule that gave the parties adequate time to file comments and reply comments, and it later extended that time due to requests by Fort Worth, American, and the DFW Board. Order 98-9-5. The Department sees no reason to delay this proceeding further.

American nonetheless complains that the Department have [sic] accelerated the schedule without cause. American Comments at 2. American, however, neither explains why the courts' schedules make it unreasonable to resolve the issues promptly nor shows that the comment schedule has prejudiced it.

ACCORDINGLY:

1. The Department of Transportation denies the motions of Fort Worth for dismissal;

2. The Department of Transportation denies the requests by Fort Worth for disclosure and abatement;

3. The Department of Transportation denies the motions for oral argument;

4. The Department of Transportation grants the motions by the City of Fort Worth and Legend Airlines to supplement the record;

5. The Department of Transportation denies the motion for mediation; and

6. The Department of Transportation grants the motions for leave to file surreplies and other unauthorized documents.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
And International Affairs

(SEAL)

An electronic version of this document is available on the World Wide Web at http://dms.dot.gov/general/orders/aviation.html

APPENDIX D

CAUSE NO. 48-171109-97

CITY OF FORT WORTH, TEXAS Plaintiff, and AMERICAN AIRLINES, INC., Plaintiff Intervenor, v. CITY OF DALLAS, TEXAS, THE DALLAS FORT WORTH INTERNATIONAL AIRPORT BOARD, JEFFREY P. FEGAN, LEGEND AIRLINES, INC., ASTRAEA AVIATION SERVICES INC. D/B/A DALFORT AVIATION, MESA AIRLINES, INC., CONTINENTAL AIRLINES, INC., and CONTINENTAL EXPRESS, INC. Defendants	§	IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS 48TH JUDICIAL DISTRICT

FINAL JUDGMENT

On October 1, 1998, the Court heard the motions for summary judgment filed by The City of Fort Worth ("Fort Worth"), American Airlines, Inc. ("American"), The City of Dallas ("Dallas"), Continental Airlines, Inc. ("Continental"), Continental Express, Inc. ("Continental Express"), and The Dallas Fort Worth International Airport Board (the "DFW Board"). All parties appeared by and through counsel of record. After considering the motions, responses, the summary judgment evidence, the

pleadings, and briefs and arguments of counsel, the Court, on October 15, 1998, signed a Partial Summary Judgment And Order and made the following findings:

F1. The April 15, 1968 Agreement ("the Agreement") between Dallas and Fort Worth and the 1968 Regional Airport Concurrent Bond Ordinance ("the Concurrent Bond Ordinance"), as described in Fort Worth's Third Amended Petition, are not pre-empted by federal law, and are valid and enforceable.

F2. Dallas and Fort Worth have agreed not to enforce the Agreement and the Concurrent Bond Ordinance insofar as it related to scheduled passenger service to or from Love Field to points within Texas and the four contiguous states, and Fort Worth does not seek to enforce the Agreement and the Concurrent Bond Ordinance with respect to scheduled passenger service within Texas and the four contiguous states.

F3. As owner of Love Field and Redbird Airports, and as co-owner of DFW Airport, Dallas is a multi-airport proprietor with a federally reserved proprietary right and power to restrict scheduled passenger service at Love Field to points within Texas and the four contiguous states.

F4. The ADA, "Wright" or "Shelby" Amendments do not convey affirmative rights which allow interstate passenger service from Love Field to points beyond Texas and its four contiguous states.

F5. No justiciable controversy exists as to Astraea Aviation Services, Inc. and Mesa Airlines, Inc.

Intervenor American Airlines, Inc. has nonsuited its claims and causes of action against defendants, the DFW Board and Jeffrey P. Fegan, and this Court has entered two (2) orders severing claims from this action and placing them into separate dockets. Defendants, Astraea Aviation Services, Inc., d/b/a Dalfort Aviation, and Mesa Airlines, Inc., have been DISMISSED from this action. Accordingly, the Court enters this Final Judgment in this action:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

D1. Dallas is obligated to prohibit scheduled interstate passenger service to or from Love Field to points beyond the four contiguous states, including the flights proposed by Legend, Continental and Continental Express.

D2. If Dallas does not prohibit scheduled interstate passenger service to or from Love Field to points beyond the four contiguous states, including the flights proposed by Legend, Continental and Continental Express, Dallas will breach the Agreement, the Concurrent Bond Ordinance, and the agreement referred to in F2. above.

D3. Section 9.5 of the Bond Ordinance prohibits Legend, Continental and Continental Express from offering scheduled commercial passenger service at Love Field, except within the State of Texas and the four states contiguous to Texas.

D4. The DFW Board and its Executive Director, Jeffrey P. Fegan, may not allow interstate passenger service from Love Field unless such service is restricted to

service to the four contiguous states or unless the DFW Board allows such service only after making a determination pursuant to § 9.5 of the Concurrent Bond Ordinance that such service is necessary in the interest of public safety, in the interest of prudent and efficient operations at DFW Airport, or in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan area considered as a whole.

D5. All taxable costs of Court incurred herein (excluding attorneys fees) are taxed against defendants, as follows: (i) taxable costs incurred by each defendant are taxed severally to the defendant that incurred them; and (ii) taxable costs incurred by Fort Worth and American are taxed jointly and severally against defendants, Dallas, the DFW Board, Jeffrey P. Fegan, Legend Airlines, Inc., Continental Airlines, Inc., and Continental Express, Inc.

It is the intention of this Court that this is the final judgment in this action. All relief not specifically granted herein is denied.

Signed this 16 day of December, 1998 @ 10:45 a.m.

/s/ Bob McCoy
BOB McCOY,
JUDGE PRESIDING